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In The

Supreme Court of the United States

OREGON NATURAL DESERT ASSOCIATION, OREGON NATURAL RESOURCES COUNCIL, OREGON WILDLIFE FEDERATION, PACIFIC RIVERS COUNCIL, PORTLAND AUDUBON SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, NATIONAL TROUT UNLIMITED, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Petitioners,

v.

MICHAEL P. DOMBECK, in his official capacity as Chief of the United States Forest Service, GRANT COUNTY, ROBERT BURRIL, and EASTERN OREGON PUBLIC LANDS COALITION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Section 401(a) of the Clean Water Act ("CWA") prohibits the federal government from issuing a permit for "any activity . . . which may result in any discharge into navigable waters . . . . " without certification from the state that the permitted activity will not violate water quality standards. 33 U.S.C. § 1341(a). The question presented for review is whether § 401 applies to non-point source pollution generated by federally permitted activities.

PARTIES TO THE PROCEEDING

The plaintiffs/petitioners are the Oregon Natural Desert Association, Oregon Natural Resources Council, Oregon Wildlife Federation, Pacific Rivers Council, Portland Audubon Society, Northwest Environmental Defense Center, and National Trout Unlimited. The plaintiff/intervenor/petitioner is the Confederated Tribes of the Warm Springs Reservation of Oregon. The defendant/respondent is Michael P. Dombeck, in his official capacity as Chief of the United States Forest Service. The defendant-intervenors/respondents are Grant County, Robert Burril, and Eastern Oregon Public Lands Coalition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners Oregon Natural Desert Association, Oregon Natural Resources Council, Oregon Wildlife Federation, The Pacific Rivers Council, Portland Audubon Society, Northwest Environmental Defense Center, and National Trout Unlimited, and intervenor/petitioner the Confederated Tribes of the Warm Springs Reservation of Oregon, state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs and plaintiff-intervenor petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals was published at 151 F.3d 945 (9th Cir. 1998), subsequently withdrawn from bound volume and republished at 172 F.3d 1092 (9th Cir. 1998). The opinion of the Ninth Circuit is reprinted in the Appendix ("App.") at App. 1. The decision of the district court, which the Ninth Circuit reversed and remanded, was published at 940 F. Supp. 1354 (D.Or. 1996), and is reprinted in the Appendix at App. 20.

JURISDICTION

The court of appeals denied plaintiffs' petition for rehearing and rehearing en banc on April 22, 1999. App. 36. The judgment of the court of appeals was entered on May 3, 1999. App. 17. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 401(a)(1) of the CWA states:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities,

> which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

33 U.S.C. § 1341(a); App. 39.

Section 502(16) of the CWA states:

> The term "discharge" when used without qualification in the CWA, includes a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1362(16); App. 39.

Section 502(12) of the CWA states:

> The term "discharge of pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source . . .

33 U.S.C. § 1362(12); App. 39.

STATEMENT OF THE CASE

Section 401 of the CWA prohibits the federal government from issuing a permit for "any activity . . . which may result in any discharge into navigable waters" unless the applicant for the permit first provides certification from the state that the discharge from the permitted

activity will not violate state water quality standards. 33 U.S.C. § 1341(a). Most water pollution from federal lands is "nonpoint" pollution caused by federally permitted activities such as cattle grazing, timber cutting, and road building.

In July of 1993, the Malheur National Forest issued a federal grazing permit (Permit) to Robert and Diana Burril, authorizing them to graze cattle on the Camp Creek grazing allotment. App. 4. There is no dispute that cattle grazing is an activity that "may" cause water pollution, and that cattle grazing on the Camp Creek grazing allotment "has resulted in pollution of both Camp Creek and the Middle Fork of the John Day River." App. 34-35. Despite the fact that the Permit would result in a discharge into navigable waters on the Camp Creek allotment, the Forest Service issued the Permit to the Burrils without § 401 certification from the State of Oregon that the permitted activity would not violate water quality standards.

On March 3, 1994, plaintiffs Oregon Natural Desert Association, et al., submitted a notice of intent to file a citizen suit under the CWA against the Forest Service for failing to require the Burrils to obtain § 401 certification from the state of Oregon before issuing the permit. The Forest Service responded that, in its opinion, § 401 did not apply to "nonpoint" sources of pollution caused by cattle grazing. Plaintiffs filed suit in the Federal District Court for the District of Oregon.

The district court ruled in favor of plaintiffs, holding that "§ 401 applies to all federally permitted activities that may result in a discharge, including discharges from

nonpoint sources." App. 34. State certification under § 401, therefore, was required before the Forest Service issued the permit. App. 35. Defendant and defendant-intervenors appealed. The Ninth Circuit reversed, holding that "[§ 401] is limited to discharges from point sources." App. 12. Plaintiffs requested a rehearing, and the Ninth Circuit withdrew its opinion from publication and asked defendants to submit briefs in response. Ultimately, however, the Ninth Circuit denied plaintiffs' request for a rehearing and allowed its initial opinion to stand. App. 36-38.

Section 401 originated in 1970 as § 21(b) of the Water Quality Improvement Act. *See* Pub. L. No. 91-224, § 21(b), 84 Stat. 91, 108 (1970). As the district court found, the CWA made no distinction between point and nonpoint sources of pollution in the 1970 Act, or in § 21(b). App. 33. The district court found, and the Ninth Circuit agreed, that § 21(b) applied to all federally permitted activities that may result in water pollution. *See* App. 33 (In 1970, "Congress intended to regulate all polluting activities"); App. 12 (Section 21(b) "required the state to certify that a licensed activity would 'not violate applicable water quality standards.' ").

In 1972, Congress adopted the National Pollutant Discharge Elimination System (NPDES) permit program to improve enforcement of water quality standards. The NPDES program prohibits the discharge of any pollutant from a point source except in compliance with an NPDES permit. *See* 33 U.S.C. §§ 1311(a); 1342(a). As the Ninth Circuit held in *Northwest Environmental Advocates v. City of Portland*, the 1972 amendments were intended to

improve enforcement of the CWA by more closely regulating point sources of pollution, but the amendments did not "preclude the enforcement of water quality standards that have not been translated into effluent limitations." 56 F.3d 979, 986 (9th Cir. 1995); *see also* App. 34 (district court noting that "Congress's 1972 amendments to the CWA were intended to improve enforcement of pollution from point sources, not supplant the old system.") (Citing *Northwest Environmental Advocates*, 56 F.3d at 986).

The district court found that the 1972 amendments did not alter the scope and intent of § 401 as originally adopted in § 21(b):

> The 1970 legislative history reveals that Congress intended to regulate all polluting activities through water quality standards. There was no distinction between point and nonpoint sources in the original Act . . . The 1970 amendments illustrate the broadness of § 401; the 1972 amendments support this.

App. 33. The Ninth Circuit, however, held that the 1972 amendments narrowed the scope of § 401 to point sources of pollution. App. 12.

The question presented for review is whether § 401 applies to nonpoint source pollution generated by federally permitted activities. Petitioners seek review in this Court because whether § 401 applies to nonpoint pollution is an important question of federal law that should be settled by the Supreme Court. The Supreme Court should also accept review because the Ninth Circuit's conclusion that § 401 does not apply to nonpoint pollution conflicts with this Court's opinion in *PUD No. 1 of*

Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994) (*PUD No. 1*).

BASIS OF JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court for the District of Oregon had jurisdiction to hear this case under § 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a) (citizen suit provision) and under 28 U.S.C. § 1331 (federal question).

ARGUMENT

The Court should grant certiorari because this petition presents "an important question of federal law which has not been, but should be, settled by the Supreme Court," and because the Ninth Circuit's opinion conflicts with this Court's opinion in *PUD No. 1*. *See* Rules of The Supreme Court of the United States, 10(c). Section 401 is the key provision in the CWA giving states authority to regulate pollution stemming from federal lands and activities. "Across the United States, States have reported that nonpoint source pollution is the most pervasive cause of water quality problems." 63 Fed. Reg. 45504 (August 26, 1998) (citing National Water Quality Inventory: 1996 Report to Congress, Environmental Protection Agency). Federal lands are no exception.[1] Section 401 is

[1] *See* Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 ELR 10415, 10419 (1998) (identifying nonpoint source pollution as the "root

the key provision of the CWA giving states the authority to protect themselves from pollution originating on federal lands, and the Ninth Circuit's decision that § 401 does not apply to the single greatest source of pollution on federal lands seriously undermines both the states' ability to protect their waters, and the CWA's goal of eliminating water pollution. *See* 33 U.S.C. § 1251(a).

I. THE PLAIN LANGUAGE OF § 401 SUPPORTS THE DISTRICT COURT'S CONCLUSION THAT ALL WATER POLLUTION CAUSED BY FEDERALLY PERMITTED ACTIVITIES IS SUBJECT TO STATE CERTIFICATION

Section 401(a)(1) requires in pertinent part that:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into . . . navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such

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cause of water quality impairment in the United States"); U.S. Environmental Protection Agency, Fact sheet, EPA841-f-95-011, National Water Quality Inventory: 1994 Report to Congress 1 (1995) (nonpoint pollution is most prevalent source of pollution in U.S. rivers and streams); Donahue, D.L., *The Untapped Power of Clean Water Act Section 401*, 23 Ecology L.Q. 201, 204-205 (1996) (noting the "grave threat" to water quality in the West posed by nonpoint source activities on federal lands); Ransel, K.P., *The Sleeping Giant Awakens: PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 25 Envtl. L. 255, 277 (1995) ("nonpoint sources accounted for approximately 65% of the stream miles for which States reported impairments of water quality; 76% of impaired lake acres were attributed by the States to nonpoint sources").

> discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, 1317.
>
> . . .
>
> No license or permit shall be granted until the certification required by this section has been obtained. . . .

33 U.S.C. § 1341(a)(1), App. 39-40. By its plain terms, § 401 applies to "any activity" which "may" result in "any discharge" to navigable waters. Cattle grazing is a federally permitted activity that "may" result in a discharge into navigable waters, and therefore applicants for federal grazing permits must obtain certification from the affected state that the permitted activity will comply with state water quality standards.

The CWA states:

> The term "discharge" when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1362(16) (emphasis added); App. 39. "Discharge of a pollutant" and "discharge of pollutants" are defined as "any addition of any pollutant to navigable waters from any point source. . . " 33 U.S.C. § 1362(12)(A); App. 39. The use of the word "includes" in the definition of "discharge" indicates that Congress did not intend to *limit* the general definition of "discharge" to "discharge of a pollutant," but instead meant the term to include, but not be limited to, point source activities. *See Power Authority v. Williams*, 101 A.2d 659, 660, 475 N.Y.S.2d 901, 904 (N.Y. App. Div. 1984) (Congress did not

intend the term "discharge" to be restricted to a discharge of pollutants only, because the definition of "discharge" in the CWA uses the word "includes"); *see also National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) (finding that the term "includes" allows for additional, unstated meanings); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) (same).

Noting that the word "includes" is a term of enlargement and not of limitation, the district court correctly concluded that "the plain meaning of 'discharge' does not restrict the definition to point sources . . . " App. 31. The Ninth Circuit agreed that the word "discharge" is a broader term than "discharge of a pollutant." *See* App. 15. The Ninth Circuit held, however, that "discharge" is broader not because it also includes nonpoint pollution, but because it includes *nonpolluting* discharges from point sources. App. 15 (" 'Discharge' is the broader term because it includes all releases from point sources, whether polluting or nonpolluting."). There is no support in the language of the CWA, the legislative history of the Act, caselaw, or common sense, for the Ninth Circuit's conclusion that the broader term "discharge" covers nonpolluting releases from point sources, rather than polluting nonpoint sources. In fact, *nothing* in the CWA or its legislative history expressed any concern with "nonpolluting" point sources. The CWA does, however, express serious concerns with nonpoint sources of pollution – the type of "discharge" that § 401 was originally intended to address.

A. The Ninth Circuit Erred When it Held that the Term "Discharge" is Limited to Releases from Point Sources

The sole authority cited by the Ninth Circuit for its conclusion that the term "discharge" includes "non-polluting discharges" from point sources, rather than nonpoint pollution, is *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*NWF*). App. 15. That opinion, however, does not support the Ninth Circuit's conclusion. *NWF* did not address the definition of "discharge," or whether the term "discharge," as used in § 401, applies to nonpoint sources. The issue in *NWF* was whether discharges from dams are "discharges of a pollutant" that require an NPDES permit. The court held that releases from dams constitute "point sources," and require an NPDES permit, if the dam "itself physically introduces a pollutant into water from the outside world." 693 F.2d at 175.

If anything, *NWF* supports the district court's conclusion that § 401 applies to *nonpoint* sources of pollution. *NWF* upheld EPA's characterization of dams as nonpoint sources of pollution that *are subject* to § 401 certification. 693 F.2d at 162. In fact, it is well-established that § 401 of the CWA applies to dams, and that dams are nonpoint sources of pollution. *See* 18 C.F.R. § 4.38(e)(2) (FERC regulations requiring § 401 certification of hydroelectric dams); *Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991) (§ 401 requires state environmental approval of proposed water projects including FERC license); *Tennessee Valley Authority v. Tennessee Water Quality Control Board*, 717 F.2d 992, 999 (6th Cir. 1983) (specifically referring to dam as

nonpoint source). Even the Forest Service has acknowledged that § 401 applies to nonpoint sources of pollution, at least those that involve a "conveyance." *See* App. 31.[2] Nothing in the CWA, however, restricts § 401 to those nonpoint sources that involve a "conveyance."

Finally, the Ninth Circuit's conclusion means that § 401 will apply only to discharges of pollutants from point sources which are already regulated under the NPDES program, and the exceptional circumstance of discharges of "nonpollutants" from point sources. Thus, the Ninth Circuit's decision finds that § 401 applies where it is not needed, and does not apply where it is needed the most. In addition, the Ninth Circuit's decision is plainly inconsistent with the language of § 401 itself, which Congress could not have written more broadly. *See* 33 U.S.C. § 1341(a) (Section 401 applies to "*[a]ny* applicant for a Federal *license or permit* to conduct *any* activity . . . which *may* result in *any* discharge into . . . navigable waters, shall provide the licensing or permitting agency a certification from the State) (emphasis added); App. 39.

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[2] Throughout this litigation, the Forest Service has argued that § 401 applies to nonpoint sources of pollution that involve a conveyance, including dams, agricultural storm water discharges, and irrigated agriculture return flows. *See, e.g.*, Defendant's Memorandum in Support of Motion for Summary Judgment, December 15, 1994, at 22 n.16.

B. The Fact that the Term "Discharge" is Expansively Qualified by the Word "Any" Removes Any Doubt that § 401 Applies to All Sources of Pollution

The definition of "discharge" states:

> The term "discharge" when used *without qualification* in the CWA, includes a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1362(16) (emphasis added); App. 39. In § 401, the term "discharge" is expansively qualified by the word "any":

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in *any discharge* into . . . navigable waters . . .

33 U.S.C. § 1341(a)(1) (emphasis added); App. 39. Thus, even if the term "discharge" were limited to point sources of pollution, which it is not, it would only be so limited when used without qualification. Congress expansively qualified the term "discharge" with the word "any" to make clear that § 401 applies to all sources of water pollution.

II. THE EVOLUTION OF § 401 DEMONSTRATES THAT THE DRAFTERS INTENDED § 401 TO APPLY TO ALL SOURCES OF POLLUTION

The district court and the Ninth Circuit agreed that, as originally adopted, § 401 applied to all sources of pollution, including nonpoint sources. The Ninth Circuit, however, concluded that the 1972 amendments to the Act impliedly narrowed the scope of § 401 to point sources of

pollution. The Ninth Circuit's conclusion is inconsistent with the legislative history and the purposes of the 1972 amendments to the CWA.

A. As Originally Adopted, § 401 Applied to All Sources of Pollution

Section 401 originated as § 21(b) of the Water Quality Improvement Act of 1970. *See* Pub. L. No. 91-224, § 21(b), 84 Stat. 91, 108 (1970). At the time § 21(b) was adopted, the CWA made no distinction between "point" and "non-point" sources of water pollution. Rather, the Act restricted all sources of pollution from violating water quality standards that applied to waters *in situ*. The legislative history of § 21(b) makes clear that, as the district court correctly held, § 21(b) was "intended to regulate all polluting activities through water quality standards." App. 33. The Ninth Circuit agreed that "prior to 1972 [§ 21(b)] required the state to certify that a licensed activity would 'not violate applicable water quality standards.' " App. 12 (citing Pub. L. 91-224, § 21(b)(1), 84 Stat. 91 (1970)).

The House Report on § 21(b) stated that it was intended to apply to "activities or operations" that affect water quality, including "discharges which might cause or contribute to the pollution of any waters from Federal property." H.R. Rep. No. 127, 91st Cong., 1st Sess. 6, 20 (1969) *reprinted in* 1970 U.S. Code Cong. & Admin. News 2697. Referring to the wide variety of permits and licenses issued by the federal government, the Report stated:

> Many of them involve activities or operations *potentially affecting water quality*. The purpose of [this subsection] is to provide reasonable assurance . . . that no license or permit will be issued by a Federal agency for an activity that . . . *could in fact become a source of pollution*.

Id. at 7 (emphasis added). The House Report went on to emphasize:

> [This subsection] would require that applicants . . . seeking a Federal license or permit to conduct *any activity of any kind or nature* which may result in discharges into the navigable waters of the United States must provide . . . a certification from the affected State . . . that such activity . . . will not reduce the quality of such waters below applicable . . . water quality standards.

Id. at 20 (emphasis added).

The Senate Report on the bill also emphasized that § 21(b) was intended to encompass all potentially polluting activities authorized by federal agencies:

> The intent of the bill is to provide that *all* activities . . . which may result in *any* discharge into the navigable waters of the United States . . . pursuant to a Federal license or permit . . . shall comply with applicable water quality standards.

S. Rep. No. 351, 91st Cong., 1st Sess. 28 (1969) (emphasis added). The Conference Committee stated unequivocally that § 21(b):

> would require that applicants . . . seeking a Federal license or permit to conduct *any activity* of *any kind or nature* which may result in discharges into the navigable waters of the United

> States must provide . . . certification from the affected State . . . that such activity will be conducted in a manner that will not reduce the quality of such waters below applicable Federal or State or local water quality standards.

H.R. Conf. Rep. No. 940, 91st Cong., 2d Sess. 51 (1970) (emphasis added). Thus, Congress plainly intended § 21(b) to address all federally permitted activities that could result in pollution of the nation's waters.

B. The 1972 Amendments to the CWA Did Not Restrict the Scope of § 401 to Point Sources of Pollution

The 1972 amendments to the CWA were adopted to improve enforcement of water quality standards by imposing effluent limitations at the "end of the pipe" on point sources of pollution through the NPDES permit program. *See Northwest Environmental Advocates*, 56 F.3d at 986 (the 1972 amendments were intended to improve enforcement of water quality standards, "not to supplant the old system."). When the 1972 amendments were adopted, § 21(b) became § 401. The language of § 401, however, remained identical in all relevant respects to the language of § 21(b). *See* App. 33 (the language under § 21(b) is "identical to the current act"). The only difference is that, under § 401, the state must certify that any discharge will comply with §§ 1311, 1312, 1313, 1316, and 1317 of the CWA. 33 U.S.C. § 1341(a)(1); App. 39-40. In comparison, § 21(b) required the state to certify that any

discharge "will not violate applicable water quality standards." Public Law 91-224, 84 Stat. 91, *reprinted in* 1970 U.S.C.C.A.N. 97, 118-19.[3]

In construing the effects of the 1972 amendments on § 401, the district court stated "[e]ven though nonpoint sources are not mentioned in the 1972 amendments, the court cannot construe that Congress intended to preclude their application to § 401. . . . The legislative history of the CWA supports the conclusion that § 401 applies to all federally permitted activities that might result in water pollution." App. 34.[4] Section 401, therefore, applies to "all federally permitted activities that may result in a discharge, including discharges from nonpoint sources." App. 34.

The Ninth Circuit reversed, holding that the 1972 amendments impliedly restricted the scope of § 401 to point sources of pollution. App. 12. There is nothing in

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[3] Section 21(b)(1) provided:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner *which will not violate applicable water quality standards* . . .

Public Law 91-224, 84 Stat. 91.

[4] Nonpoint pollution was not separately identified in the 1970 Act, or § 21(b), either. Yet, there is no dispute that § 21(b) applied to all sources of pollution, including nonpoint sources.

the legislative history or the language of the 1972 amendments, however, indicating that in 1972 Congress intended to narrow the original scope and breadth of § 21(b).[5] The only legislative history cited by the Ninth Circuit for its conclusion that § 21(b) was narrowed in 1972 to apply only to point sources is S. Rep. No. 414, at 69 (1971). *See* App. 12. The Senate Report, however, does not reach this conclusion. It states:

> [section 401] *is substantially section 21(b)* of existing law (enacted as a part of the Water Quality Improvement Act of 1970) amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.

S. Rep. No. 414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3764 (emphasis added). This language only shows that § 401 was *broadened* to include the newly adopted NPDES program, as well as all the other activities originally encompassed in § 21(b). This reading of the legislative history is also consistent with this Court's opinion in *Arkansas v. Oklahoma*, which recognized that water quality standards must be satisfied even after the 1972 amendments to the CWA:

> [T]he EPA has construed the [CWA] as requiring that EPA-issued NPDES permits also comply

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[5] The Ninth Circuit's conclusion that § 401 was amended in 1972 to apply only to point sources of pollution seems directly contrary to its holding in *Northwest Environmental Advocates v. City of Portland*, *supra*, finding that the 1972 amendments to the CWA did *not* supplant pre-existing water quality standards. 56 F.3d at 986.

> with § 401(a). That section, which predates § 402 and the NPDES, applies to a broad category of federal licenses, and sets forth requirements for "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a). Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's *water quality requirements* can be insured.

503 U.S. 91, 103, 112 S. Ct. 1046, 1055 (1992) (*Arkansas*) (emphasis added). As we note in part IV, *infra*, the Ninth Circuit's opinion also appears to conflict with this Court's opinion in *PUD No. 1*, *supra*, holding that when a federally permitted activity is subject to § 401, the state's regulatory powers are not limited to "point source" discharges. 511 U.S. at 712.

III. WATER QUALITY STANDARDS REMAIN SEPARATELY ENFORCEABLE AGAINST NONPOINT SOURCES OF WATER POLLUTION

Section 401 requires that the state certify, *inter alia*, that any discharge will comply § 1313 of the CWA. Section 1313 of the CWA requires states to adopt water quality standards, which consist of numerical criteria and the designation and protection of "beneficial uses" of the water body. *See* 33 U.S.C. § 1313(c). The inclusion of § 1313 in § 401 serves the same purpose as the reference to "water quality standards" did in § 21(b). Both the

Ninth Circuit and the district court agree that the reference to "water quality standards in § 21(b) included all sources of pollution. *See* App. 33 (In 1970, "Congress intended to regulate all polluting activities"); App. 12 (Section 21(b) "required the state to certify that a licensed activity would 'not violate applicable water quality standards.' "). The inclusion of § 1313 in § 401 also confirms that, as the Senate Report stated, "[Section 401] *is substantially section 21(b)* of existing law." S. Rep. No. 414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3764. Like § 21(b) therefore, § 401 includes all sources of pollution.

The Ninth Circuit reasoned that, because § 1313 does not itself regulate nonpoint source pollution, § 401's reference to § 1313 does not sweep nonpoint pollution into § 401:

> [§ 1313] does not itself regulate nonpoint source pollution. Water quality standards are established *in part* to regulate point source pollution. They provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.

App. 12-13 (citing *EPA v. California ex rel. State Water Resources Controls Bd.*, 426 U.S. 200, 205 n. 12 (1976)) (emphasis added). But the fact that water quality standards were established "in part" to regulate point sources of pollution does not mean, as the Ninth Circuit apparently concluded, that they were established *solely* to regulate point source pollution. To the contrary, as the Ninth Circuit held in *Northwest Environmental Advocates v. City*

of Portland, supra, water quality standards remain separately enforceable even after the 1972 amendments. 56 F.3d at 986. And as this Court held in *PUD No. 1,* 511 U.S. at 714, § 401 allows states to protect water quality standards by conditioning § 401 certification on measures in addition to and apart from point source effluent limitations. In fact, § 1313 creates water quality standards that apply regardless of the source of pollution,[6] and its inclusion in § 401 confirms that Congress intended to continue § 21(b)'s applicability to all sources of pollution, including nonpoint. Cross-referencing § 1313 is in any event not an indication of congressional intent to narrow § 21(b) to apply only to point sources.

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[6] For example, § 1313 requires states to list and prioritize waters that do not meet water quality standards and develop total maximum daily loads (TMDLs) of pollutants for those waters. 33 U.S.C. § 1313(d)(1)(A),(C). TMDLs must take into account nonpoint sources of pollution. *Sierra Club v. Hankinson,* 939 F. Supp. 865, 871 (N.D. Ga. 1996) (Georgia's TMDLs inadequate for, *inter alia,* failing to consider nonpoint source pollution); *Dioxin/Organochlorine Center v. Clarke,* 57 F.3d 1517, 1520 (9th Cir. 1994) ("a TMDL represents the cumulative total of all 'load allocations' which are in turn best estimates of the discrete loading attributed to *nonpoint sources,* natural background sources, and individual wasteload allocations"); *Idaho Sportmen's Coalition v. Browner,* 951 F. Supp. 962, 965 (W.D. Wa. 1996) (after a TMDL is established, "[s]tates are then required to take whatever additional cleanup actions are necessary, which can include further controls on both point *and nonpoint* pollution sources") (emphasis added); *Alaska Center for the Environment v. Reilly,* 762 F. Supp. 1422, 1424 (W.D. Wa. 1991) (the TMDL process " 'provides a comprehensive approach to identifying and resolving water pollution problems regardless of the sources of pollution' ").

The Ninth Circuit relied on *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 849 n. 9 (9th Cir. 1987) (*ONRC*), for its finding that the inclusion of § 1313 does not bring nonpoint pollution into the purview of § 401. App. 13. *ONRC*, however, does not support the Ninth Circuit's conclusion. *ONRC* addressed the scope of § 301 of the CWA, not the scope of § 401. Section 301 of the CWA makes the "discharge of any pollutant" unlawful except in compliance with an NPDES permit. 33 U.S.C. § 1311(a). Plaintiffs in *ONRC* argued that § 301's reference to water quality standards brought nonpoint pollution into the purview of § 301. The court rejected plaintiffs' argument because § 301 specifically prohibits the "discharge of a pollutant," which in turn is clearly defined as a "discharge from a point source." 33 U.S.C. §§ 1311(a); 1362(12). Section 401, however, applies to "discharges," not "discharges of a pollutant." *ONRC*, therefore, is not analogous.

Finally, the Ninth Circuit reasoned that, because nonpoint pollution is not directly regulated by the federal government through the CWA, it is not included in § 401. App. 10-11. As the Ninth Circuit notes, however, the CWA places primary control of nonpoint pollution with the states. App. 10-11. *See also* 33 U.S.C. § 1288 (CWA charges states with controlling nonpoint sources of pollution); 33 U.S.C. § 1315(b)(1)(E) (CWA requires states to report to EPA every two years on, *inter alia*, "the nature and extent of nonpoint sources of pollutants, and recommendations as to the programs which must be undertaken to control each category of such sources"). Without the authority to address nonpoint pollution generated by federally permitted activities, the states cannot fulfill

their responsibility under the CWA to control nonpoint pollution. It is only logical, therefore, that § 401 – the states' primary mechanism for regulating federally permitted activities that generate pollution – include nonpoint sources.

IV. THE NINTH CIRCUIT'S CONCLUSION THAT § 401 IS LIMITED TO DISCHARGES FROM POINT SOURCES IS CONTRARY TO THIS COURT'S REASONING AND CONCLUSION IN *PUD NO. 1 OF JEFFERSON COUNTY V. WASHINGTON DEPARTMENT OF ECOLOGY*

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the state of Washington sought to impose minimum streams low requirements as a condition of its § 401 certification of a dam on the Dosewallips River. 511 U.S. 700, 114 S. Ct. 1900 (1994). The Court held that states may require, as a condition of § 401 certification, limitations on *any* activity, not merely point source discharges, that threaten to violate state water quality standards. 511 U.S. at 712 ("EPA's conclusion that *activities* – not merely discharges – must comply with state water quality standards is a reasonable interpretation of § 401.") (Emphasis in original). This Court's conclusion that § 401 certification may address *all sources* of federally permitted pollution is consistent with the broad powers granted to the states under § 401. The Ninth Circuit asserts that petitioners' reliance on *PUD No. 1* is misplaced, because in *PUD No. 1* the Court determined that, for § 401 to apply, the threshold condition of a "discharge" must be satisfied. App. 13 (citing *PUD No. 1*, 511 U.S. at 712). Nowhere in *PUD No. 1*, however, did this Court hold that the

"discharge" triggering § 401 certification must emanate from a point source. In fact, as discussed *supra*, § 401 has long been applied to dams, which are considered a "nonpoint" source of pollution. This Court's ruling in *PUD No. 1*, that states may protect themselves from nonpoint sources of pollution when issuing § 401 certifications, has little meaning if states do not have to issue certifications for nonpoint sources in the first instance.

CONCLUSION

There is no question that, when § 401 was adopted in 1970, it applied to all federally permitted activities, including nonpoint source activity, that may result in water pollution. There is no support, in the caselaw or legislative history, for the Ninth Circuit's conclusion that § 401 was impliedly restricted in 1972 to polluting and "nonpolluting" discharges from point sources. In addition, the Ninth Circuit's opinion defeats the purpose of § 401 by stripping the states of their ability to protect their waters from the most prevalent source of pollution stemming from federal lands and federally permitted activities. For these reasons, petitioners respectfully urge the Court to grant certiorari.

Respectfully submitted,

MICHAEL AXLINE
CARRIE STILWELL
Counsel for Petitioners

July 21, 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON NATURAL DESERT ASSOCIATION; REST THE WEST; PORTLAND AUDUBON SOCIETY; TROUT UNLIMITED; OREGON WILDLIFE FEDERATION; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NATURAL RESOURCES COUNCIL; PACIFIC RIVERS COUNCIL; OREGON NATURAL RESOURCES COALITION, *Plaintiffs-Appellees,* and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, *Plaintiff-Intervenor-Appellee,* v. MICHAEL P. DOMBECK, in his official capacity as CHIEF OF THE UNITED STATES FOREST SERVICE, *Defendant-Third Party Defendant-Appellant,*	No. 97-35065 D.C. No. CV-94-00522-ALH OPINION

OREGON NATURAL DESERT ASSOCIATION; REST THE WEST; PORTLAND AUDUBON SOCIETY; TROUT UNLIMITED; OREGON WILDLIFE FEDERATION; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NATURAL RESOURCES COUNCIL; PACIFIC RIVERS COUNCIL; OREGON NATURAL RESOURCES COALITION,

Plaintiffs-Appellees,

and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Plaintiff-Intervenor-Appellee,

v.

JACK WARD THOMAS, in his official capacity as Chief of the United States Forest Service,

Defendant,

and

EASTERN OREGON PUBLIC LAND COALITION; ROBERT BURRIL, GRANT COUNTY, a Political subdivision of the State of Oregon,

Defendants-Intervenors/Third Party Plaintiffs-Appellants.

No. 97-35112
97-35115

D.C. No.
CV-94-00522-ALH

Appeals from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted
February 10, 1998 – San Francisco, California

Filed July 22, 1998

Before: Mary M. Schroeder, Jerome Farris, and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Nancy B. Firestone, Assistant United States Attorney, Washington, D.C.; Daniel E. O'Leary, Davis Wright Tremaine, Portland, Oregon; Ronald S. Yockim, Roseburg, Oregon, for the appellants.

Michael Axline, Western Environmental Law Center, Eugene, Oregon; Howard G. Arnett, Karnopp, Petersen, Noteboom, Hubel, Hansen & Arnett, Bend, Oregon, for the appellees.

OPINION

SCHROEDER, Circuit Judge:

The United States Forest Service appeals the district court's ruling that pollution from cattle grazing is subject to the certification requirement of § 401 of the Clean Water Act, 33 U.S.C. § 1341. This appeal requires us to consider whether the term "discharge" in § 1341 includes releases from nonpoint sources as well as releases from point sources. We conclude from the language and structure of the Act that the certification requirement of § 1341

was meant to apply only to point source releases. Accordingly, we reverse.

The background of this case can be briefly described. In 1993 the Forest Service issued a permit allowing Robert and Diana Burril to graze 50 head of cattle in Oregon's Malheur National Forest. The cattle graze several months a year in and around Camp Creek and the Middle Fork of the John Day River, polluting these waterways with their waste, increased sedimentation, and increased temperature. In 1994 Oregon Natural Desert Association (ONDA) filed an action under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, as well as the Administrative Procedures Act, 5 U.S.C. § 702. ONDA alleged that the Forest Service had violated 33 U.S.C. § 1341 by issuing the grazing permit without first obtaining the State of Oregon's certification that the grazing would not violate the state's water quality standards. The Burrils, Grant County, and the Eastern Oregon Public Lands Coalition intervened as defendants and the Confederated Tribes of the Warm Springs Reservation intervened as plaintiffs. The district court granted the plaintiffs' summary judgment motion, concluding that the Forest Service must obtain certification for activities that will potentially cause nonpoint source pollution.

Standing

We first address the Intervenor/Appellants' contention that ONDA lacks standing to bring this suit. To establish standing a plaintiff must demonstrate: (1) the invasion of a legally-protected interest; (2) a causal connection between the injury and the defendant's conduct;

and (3) a likelihood that the court can redress the injury by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). ONDA is an environmental group whose members live adjacent to the John Day River and use it for recreation. There is no question that the river's pollution has injured them. *See Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (Harm to a plaintiff's aesthetic and environmental well-being is a cognizable injury.); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992) (An organization has standing by alleging injury to individual members.).

The Intervenor/Appellants argue that by challenging the lack of certification, ONDA has alleged "only a procedural injury," and thus has not demonstrated a concrete injury or the likelihood of redressability. The legal requirement ONDA seeks to impose is one that would affect the reality of the environment. This is a case, therefore, where plaintiffs seek "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Lujan*, 504 U.S. at 572. We have held threatened harm to "health, recreational use, and enjoyment" from the use of herbicides constitutes an impairment of a concrete interest. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994). Certainly, ONDA has demonstrated a concrete interest where its members reside and engage in recreational activities along polluted waterways.

For similar reasons, the appellants' argument that there is no redressable injury must fail. Appellants suggest that ONDA must prove either that the state would deny certification or that certification would necessitate a change in the grazing operation. To establish

redressability, however, the plaintiffs need not demonstrate that the ultimate outcome following proper procedures will benefit them. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1518 (9th Cir. 1992). The Supreme Court has recognized that the assertion of a procedural right is "special" and reduces the plaintiff's burden of proving immediacy and redressability. *Lujan*, 504 U.S. at 572 n.7. ONDA stands in a similar position to the hypothetical plaintiff, discussed in *Lujan*, who lives adjacent to the construction site for a federally-licensed dam. The Court noted that such a plaintiff could challenge a federal agency's failure to prepare an Environmental Impact Statement, even though the plaintiff could not establish that the EIS would alter the construction plan for the dam or even that the dam would be completed in the near future. *See id.* Here, ONDA asserts a similar procedural right of certification under § 1341.

Citizen Suit Provision

Appellants argue that even if ONDA has standing to sue under Article III, its suit is not authorized under the Clean Water Act's citizen suit provision. That statute provides that any citizen may bring a civil action against an agency alleged to be in violation of an effluent standard or limitation. 33 U.S.C. § 1365(a). "Effluent standard or limitation" is defined to include "certification under section 1341 of this title." 33 U.S.C. § 1365(f)(5).

Appellants contend that the statute authorizes suits to enforce only the discharge limitations already contained within state certifications. The statute on its face is not so limited. Section 1365(f) cross-references the

entirety of section 1341, which provides in relevant part that "No license or permit shall be granted until the certification required by this section has been obtained. . . . " 33 U.S.C. § 1341(a). An agency that has issued a permit without the appropriate certification is in violation of the certification requirement under § 1341 and therefore in violation of an "effluent standard or limitation" under § 1365. The statute authorizes any citizen to bring a suit against such an agency, in this case the Forest Service.

Appellants' reliance on *Bennett v. Spear,* 117 S. Ct. 1154 (1997), is misplaced. The Court there held that a citizen could not invoke the Endangered Species Act's general civil suit provision to sue the Secretary of the Interior for a discretionary act, when a separate, specific provision authorized suits against the Secretary only for nondiscretionary acts. *See id.* at 1166. There is no similar limitation in the Clean Water Act that would restrict citizen suits to challenges of certifications already granted. It authorizes suits for violation of certification requirements.

The Merits

The crux of this case is whether the Burrils' Forest Service grazing permit requires certification from the State of Oregon. The resolution of this question hinges on the interpretation of the term "discharge" as used in § 1341. That section provides:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any

> discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived. . . .

The Clean Water Act defines point sources as "discernible, confined and discrete conveyances" such as a pipe, ditch, or machine. 33 U.S.C. § 1362. Other pollution sources, such as runoff from agriculture or in this case, animal grazing, are nonpoint sources. *See id.; Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987).

The appellees argued before us and the district court that "discharge" in § 1341 refers to pollution from both point sources and nonpoint sources. In accepting this argument below, the district court relied exclusively on § 502 of the Act, which provides:

> (12) The term "discharge of a pollutant" [means] any addition of any pollutant to navigable waters from any point source. . . .
>
> (16) The term "discharge" when used without qualification includes a discharge of a pollutant. . . .

33 U.S.C. § 1362. The district court reasoned that because the unqualified term "discharge" is defined as including, but not limited to, point source releases, it must include

releases from nonpoint sources as well. The court therefore concluded that the term "discharge" encompassed nonpoint source pollution like runoff from grazing. It rejected the government's position that the unqualified term "discharge" is limited to point sources but includes both polluting and nonpolluting releases.

We review this question of law de novo. *See Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997). We examine "the language of the governing statute, guided not by a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). The Clean Water Act, when examined as a whole, cannot support the conclusion that § 1341 applies to nonpoint sources.

We have discussed at length the impact of the 1972 enactment of the Clean Water Act, which largely supplanted the 1970 Water and Environmental Quality Improvement Act by replacing water quality standards with point source effluent limitations.

> Prior to 1972, Congress attempted to control water pollution by focusing regulatory efforts on achieving "water quality standards," standards set by the states specifying the tolerable degree of pollution for particular waters. *See EPA v. State Water Resources Control Board*, 426 U.S. 200, 202-03 (1976). This scheme had two important flaws. First, the mechanism of enforcement was cumbersome. Regulators had to work backward from an overpolluted body of water and determine which entities were responsible; proving cause and effect was not

> always easy. Second, the scheme failed to provide adequate incentives to individual entities to pollute less; an entity's dumping pollutants into a stream was ignored if the stream met the standards. *Id.* The scheme focused on "the tolerable effects rather than the preventable causes" of pollution. *Id.*
>
> In 1972, Congress passed the Clean Water Act, which made important amendments to the water pollution laws. The amendments placed certain limits on what an individual firm could discharge, regardless of whether the stream into which it was dumping was overpolluted at the time. . . . The Act thus banned only discharges from point sources. The discharge of pollutants from nonpoint sources – for example, the runoff of pesticides from farmlands – was not directly prohibited. The Act focused on point source polluters presumably because they could be identified and regulated more easily that nonpoint source polluters.

Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990) (footnote omitted).

The Clean Water Act thus overhauled the regulation of water quality. Direct federal regulation now focuses on reducing the level of effluent that flows from point sources. This is accomplished through the issuance of permits under the National Pollutant Discharge Elimination System (NPDES). *See* 33 U.S.C. § 1342. The Act prohibits the release of pollutants from point sources except in compliance with an NPDES permit. 33 U.S.C. § 1311.

Nonpoint source pollution is not regulated directly by the Act, but rather through federal grants for state

wastewater treatment plans. Section 208 of the Act requires each such plan to contain procedures for the identification and control of nonpoint source pollution. 33 U.S.C. § 1288(b)(2). If the EPA approves a state's plan, it may make grants to the state to defray the costs of administering the plan, see 33 U.S.C. § 1288(f), or to construct facilities, see 33 U.S.C. § 1288(g). Thus, the Act provides no direct mechanism to control nonpoint source pollution but rather uses the "threat and promise" of federal grants to the states to accomplish this task. *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988); *see also Natural Resources Defense Council v. EPA*, 915 F.2d at 1316 n.3 (CWA does not penalize nonpoint source polluters). Section 1329, added to the Act in 1987, requires states to adopt nonpoint source management programs and similarly provides for grants to encourage a reduction in nonpoint source pollution. *See Natural Resources Defense Council v. EPA*, 915 F.2d at 1318.

We recognized the Act's separate treatment of point and nonpoint source pollution in *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d at 842. There, an environmental group attempted to use the Act's citizen suit provision to enjoin a logging operation that caused nonpoint source pollution. The Act allows a citizen to sue for the violation of an effluent limitation under 33 U.S.C. § 1311. *See* 33 U.S.C. § 1365(f)(2). The plaintiffs argued that the effluent limitations of § 1311 applied to nonpoint sources by virtue of § 1311(b)(1)(C), which referenced state water quality standards. We rejected this argument as contrary to the structure and plain language of the Act. "The title and construction of section

1311(b)(1) lead us to the logical conclusion that the limitations set forth in section 1311(b)(1)(C) are 'effluent limitations' and, therefore, by definition, applicable only to point sources." *Id.* at 850.

We must reach the same conclusion with regard to the scope of the term "discharge" in § 1341. Prior to 1972, the provision required the state to certify that a licensed activity would "not violate applicable water quality standards." Pub.L. 91-224, § 21(b)(1), 84 Stat. 91 (1970). Now, the statute requires certification that any discharge from the licensed activity "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317" of Title 33. 33 U.S.C. § 1341(a)(1). The statute was thus amended "to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." S.Rep. No. 414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3764, 3735. The term "discharge" in § 1341 is limited to discharges from point sources.

All of the sections cross-referenced in § 1341 relate to the regulation of point sources. Appellees contend section 1313, requiring states to establish water quality standards, relates to nonpoint source pollution because it addresses water quality standards and implementation plans. The section does not itself regulate nonpoint source pollution. Water quality standards are established in part to regulate point source pollution. They provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex. rel. State Water Resources Control Bd.*, 426 U.S. 200, 205

n.12 (1976). In *Oregon Natural Resources Council*, 834 F.2d at 850, we held that the reference to water quality standards in § 1311(b)(1)(C) did not sweep nonpoint sources into the scope of § 1311. For similar reasons, § 1313 does not sweep nonpoint sources into the scope of § 1341.

Appellees' reliance on the Supreme Court's decision in *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), is similarly misplaced. In that case, the State of Washington issued a § 1341 certification for a dam, conditioned on minimum stream flows in order to protect fisheries. The Court held that such a condition was permissible under § 1341 even though it did not relate to an effluent discharge from the dam. Thus, a state is free to impose such water-quality limitations "once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 712. The Supreme Court in *PUD No. 1* did not broaden the meaning of the term "discharge" under § 1341. All parties conceded that the construction of the dam would result in discharges from both the release of dredge and fill material and the release of water through the dam's tailrace. *See id.* at 711. Both of these releases, however, would involve point sources; the tailrace is a conveyance and the dredge and fill operation presumably would involve a conveyance or rolling stock. *See* 33 U.S.C. 1362(14).

The terminology employed throughout the Clean Water Act cuts against ONDA's argument that the term "discharge" includes nonpoint source pollution like runoff from grazing. Neither the phrase "nonpoint source discharge" nor the phrase "discharge from a nonpoint source" appears in the Act. Rather, the word "discharge" is used consistently to refer to the release of effluent from

a point source. By contrast, the term "runoff" describes pollution flowing from nonpoint sources. The term runoff is used throughout 33 U.S.C. § 1288, describing urban wastewater plans, and 33 U.S.C. § 1314(f), providing guidelines for identification of nonpoint sources of pollution. Section 1341 contains no reference to runoff.

Had Congress intended to require certification for runoff as well as discharges, it could easily have written § 1341 to mirror the language of § 1323, which directs federal agencies "engaged in any activity which may result in the discharge or runoff of pollutants" to comply with applicable water quality standards. 33 U.S.C. § 1323(a). Section 1323 plainly applies to nonpoint sources of pollution on federal land. ONDA does not seek relief under this provision, however, because absent the issuance of an NPDES permit under § 1342, a citizen suit under the Clean Water Act may not be based on a violation of 33 U.S.C. § 1323. *See* 33 U.S.C. § 1365(f).

We have recognized the distinction between the terms "discharge" and "runoff":

> Nonpoint source pollution is not specifically defined in the Act, but is pollution that does not result from the "discharge" or "addition" of pollutants from a point source. Examples of nonpoint source pollution include runoff from irrigated agriculture and silvicultural activities.

Oregon Natural Resources Council, 834 F.2d at 849 n.9. We have further noted that "Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point

of discharge." *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984).

Appellees contend that we must adopt the district court's interpretation of "discharge" because that term is defined more broadly than "discharge of pollutants . . . from any point source." They argue that "discharge" may only be the broader term if it includes releases from nonpoint sources. This is incorrect. "Discharge" is the broader term because it includes all releases from point sources, whether polluting or nonpolluting. The D.C. Circuit reached this conclusion in *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). There, the court interpreted "discharge" in § 1362(16) of the Act to include the release from a point source of turbid water that did not contain any pollutant. This is the logical interpretation of § 1362(16) that comports with the structure and lexicon of the Clean Water Act.

Intervenor/Appellee Confederated Tribes suggests that the grazing of cattle is "sufficiently similar" to point source pollution to require its inclusion in the definition of the term "discharge." The cattle in question wade in the John Day River and thus introduce their waste directly into the stream. The Tribes argue that we should not distinguish between the manmade conveyances that define a point source and cattle, whose range is normally controlled by manmade structures such as fences. The Clean Water Act, however, does not include animals in its definition of point sources. *See* 33 U.S.C. § 1362(14). It would be strange indeed to classify as a point source something as inherently mobile as a cow. We agree with the Second Circuit that the term "point source" does not

include a human being, or any other animal. *See United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993).

The Tribes also suggest that these cattle may constitute a "concentrated animal feeding operation" under § 1362(14). This position is not tenable. Even assuming that open range grazing could be classified as a concentrated animal feeding operation, a question we do not reach, the controlling regulations make the determination as to whether feeding operations of this size must be certified a discretionary decision of the state NPDES program Director. *See* 40 C.F.R. 122.23(c). Neither the Director nor the record of any state administrative proceeding is before us.

CONCLUSION

For these reasons we hold that certification under § 1341 is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources.

The judgment of the district court is REVERSED and the matter REMANDED for entry of judgment in favor of the defendant.

JUDGMENT

==========

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-35065
CT/AG#: CV-94-00522-ALH

(Filed May 3, 1999)

OREGON NATURAL DESERT ASSOCIATION; REST THE WEST; PORTLAND AUDUBON SOCIETY; TROUT UNLIMITED; OREGON WILDLIFE FEDERATION; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NATURAL RESOURCES COUNCIL; PACIFIC RIVERS COUNCIL; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NATURAL RESOURCES COALITION

Plaintiffs - Appellees

and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

Plaintiff - Intervenors - Appellee

v.

MICHAEL P. DOMBECK, in his official capacity as CHIEF OF THE UNITED STATES FOREST SERVICE

Defendant - Third Party Defendant/Appellant

NO. 97-35112
CT/AG#: CV-94-00522-ALH

OREGON NATURAL DESERT ASSOCIATION; REST THE WEST; PORTLAND AUDUBON SOCIETY; TROUT UNLIMITED; OREGON WILDLIFE FEDERATION; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; PACIFIC RIVERS COUNCIL; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NATURAL RESOURCES COUNCIL

Plaintiffs - Appellees

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION

Plaintiff-intervenor - Appellee

v.

JACK WARD THOMAS, in his official capacity as Chief of the United States Forest Service

Defendant

and

EASTERN OREGON PUBLIC LAND COALITION; ROBERT BURRIL

Defendant-Intervenors/
Third-Party Plaintiffs - Appellants

NO. 97-35115
CT/AG#: CV-94-00522-ALH

OREGON NATURAL DESERT ASSOCIATION; REST THE WEST; PORTLAND AUDUBON SOCIETY; TROUT UNLIMITED; OREGON WILDLIFE FEDERATION; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; PACIFIC RIVERS COUNCIL; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NAURAL RESOURCES COUNCIL

Plaintiff - Appellees

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

Plaintiff-intervenor - Appellee

v.

JACK WARD THOMAS, in his official capacity as Chief of the United States Forest Service

Defendant

and

GRANT COUNTY, a Political subdivision of the State of Oregon

Defendant-Intervenor/
Third-Party Plaintiff - Appellant

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be head on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED.

Filed and entered 7/22/98

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASSOCIATION, REST THE WEST, OREGON NATURAL RESOURCES COUNCIL, OREGON WILDLIFE FEDERATION, THE PACIFIC RIVERS COUNCIL, PORTLAND AUDUBON SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, AND TROUT UNLIMITED,	)	Civil No. 94-522-HA
Plaintiffs,	)	OPINION AND ORDER
and	)	
THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,	)	
Plaintiff-Intervenor,	)	
v.	)	
JACK WARD THOMAS, in his official capacity as CHIEF OF THE UNITED STATES FOREST SERVICE,	)	
Defendant,	)	
and	)	
EASTERN OREGON PUBLIC LAND COALITION and ROBERT BURRIL,	)	
Defendants-Intervenors and Third-Party Plaintiffs,	)	

GRANT COUNTY, a political subdivision of the State of Oregon,

Defendant-Intervenor and Third-Party Plaintiff,

v.

JACK WARD THOMAS, in his official capacity as CHIEF OF THE UNITED STATES FOREST SERVICE,

Third-Party Defendant.

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HAGGERTY, Judge:

Plaintiffs, are a collection of several environmental groups, and plaintiff-intervenor, the Confederated Tribes of the Warm Springs Reservation of Oregon, bring this action against the United States Forest Service ("USFS") under the citizen suit provision of the Clean Water Act

("CWA"), 33 U.S.C. § 1365, as well as under the Administrative Procedures Act ("APA"), 5 U.S.C. § 702. Plaintiffs seek a declaratory judgment establishing that applicants for federal grazing permits receive, as a necessary precondition to the issuance of that permit, certification from the state in which the grazing is to occur that the grazing activity will not adversely impact state water quality standards.

The matters before the court are the plaintiffs' and plaintiff-intervenor's motions for declaratory and injunctive relief and summary judgment; the USFS motions for judgment on the pleadings or in the alternative for summary judgment; and the motion to dismiss or for summary judgment from the defendant-intervenors, Grant County and Robert Burril.

BACKGROUND

Section 401 of the Clean Water Act requires state certification for any applicant applying for a Federal license or permit for any activity that may result in a discharge. In July 1993, the USFS issued Term Grazing Permit # 01607 for the Camp Creek allotment to Robert Burril, enabling Burril to graze his cattle on federal lands in the Malheur National Forest in Oregon. The grazing permit allotment straddles the Middle Fork of the John Day River and Camp Creek, a tributary of the John Day River. The permit was issued without § 401 certification.

Plaintiffs and plaintiff-intervenor filed a civil action against the USFS under the CWA citizen, suit provision, 33 U.S.C. § 1365, and § 702 of the Administrative Procedures Act. Plaintiffs seek a declaration that the USFS is

violating § 401(a)of the CWA by issuing grazing permits without requiring the permittee to first obtain certification from the state of Oregon establishing that the grazing will not violate state water quality standards. Plaintiffs and plaintiff-intervenor also seek an order directing the USFS to suspend the grazing permit pending certification.

On March 3, 1994, plaintiffs submitted notice of intent to file a citizen suit under the CWA against the USFS. On December 15, 1994, the USFS filed a motion for judgment on the pleadings or in the alternative for summary judgment, raising the issue of whether the diffuse runoff of pollutants from grazing constitutes a "discharge" in § 401. The plaintiffs and plaintiff-intervenors also seek summary judgment.

JURISDICTIONAL STANDARDS AND ARGUMENTS

"[W]here a jurisdictional issue is separable from the merits of a case, the court may determine jurisdiction by the standards of a Rule 12(b)(1) motion to dismiss for lack of jurisdiction. In such a situation, the district court is: 'free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary.' " *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (internal quotation omitted).

"Because the court's power to hear the case is at stake, it is not limited to considering the allegations of the complaint. It may consider *extrinsic evidence;* and if the evidence is disputed, it may weigh the evidence and

determine the facts in order to satisfy itself as to its power to hear the case. . . . " Schwarzer, Tashima, Wagstaffe, *Federal Civil Procedure Before Trial*, RUTTER GROUP PRACTICE GUIDE § 9:85 (1992) (emphasis in original) (citing *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990)). Where the question of jurisdiction is dependent on the resolution of factual issues going to the merits of the action, however, a court may not resolve genuinely disputed facts. *Augustine* at 1077; *See* Schwarzer § 9:85.1.

As a preliminary matter, the court must address several procedural challenges raised by defendants. Defendants have moved to dismiss this action on the alternative grounds that plaintiffs and plaintiff-intervenor lack standing, the right to judicial review, and/or jurisdiction.

1. Standing

The standing requirements are described in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), in which the Supreme Court provided a three-part test:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent," not "conjectural or hypothetical;" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as

> opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 2136 (internal citations omitted).

The standing analysis is affected by whether the plaintiff is the object of an government's action or inaction. *Id.* at 2137. If the plaintiff is an object of governmental action, then there is little question of an injury, and that a judgment will redress it. *Id.* The government's unlawful regulation, or lack of regulation, of another entity requires more to establish standing. *Id.*

The defendant-intervenor argues that plaintiffs do not satisfy the standing requirements. Defendant-intervenor claims (1) that there is no injury because there is no evidence that any member of the plaintiff environmental groups lives near Camp Creek, or that the harm allegedly suffered by them is connected to grazing practices; (2) that there is no traceability because there is no connection between the issuance of the permit without state certification and deleterious grazing practices; and (3) that there is no redressability because ordering state certification will not guarantee that water quality impacts will be prevented.

The defendant-intervenor asserts similar arguments with regard to the Warm Springs Tribe. They claim that (1) the Tribe has not shown that the treaty rights apply to Camp Creek, (2) there is no connection between issuance of grazing permit without state certification and harm to the treaty rights, and (3) there is no evidence that the harm will cease if the Forest Service orders state certification.

The defendant-intervenor's argument fails. Plaintiffs and plaintiff-intervenor satisfy the *Lujan* standing test, having established an injury in fact because plaintiffs live and recreate in the area of the challenged action. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1345-55 (9th Cir. 1994) (holding that a procedural challenge does not mean plaintiffs' injury is procedural if plaintiff lives or recreates in the area). Plaintiffs have also adequately established traceability, in light of the Forest Service's admission that cattle grazing contributes to water pollution, and the showing that pollution in Camp Creek is related to cattle grazing. The redressability requirement is also satisfied, since plaintiffs need not establish that following the required procedures will lead to a different result. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1518 (9th Cir. 1992) (explaining that the "ultimate outcome following proper procedures is not in question"). Rather, plaintiffs need only show that a procedural requirement was not followed.

The Tribe also has standing. The Tribe has treaty rights in the John Day River Basin, and these rights are injured by the alleged violations.

2. Judicial Review

The defendants next argue that plaintiffs can not sue under the CWA citizen suit provision, CWA § 505, 33 U.S.C. 1365 (1994), to enforce water quality standards. Their argument is based on *Oregon Natural Resources Council v. U. S. Forest Service*, 834 F.2d 842, 849 (9th Cir. 1987), which held that citizens could sue under § 505 for violations of effluent limitations, but that such a right

was applicable only to point sources and did not extend to water quality standards.

In *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995), however, the Ninth Circuit held that citizens can enforce permit conditions through § 505 for effluent *and* water quality violations. *Id.* at 986-987. Accordingly, plaintiffs can seek enforcement of § 401 certification violations under § 505 for water quality standards.

The defendant-intervenors also assert that Burril, the permit applicant, did not receive adequate notice from plaintiff-intervenors, as is purportedly required under § 505. The defendants rely upon *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 (1989), in which the Supreme Court held that the plaintiffs failed to comply with certain citizen suit notice requirements, necessitating dismissal of the suit.

Hallstrom involved one plaintiff who failed to give notice to the defendants. In this case, plaintiffs gave notice to Burril, while the plaintiff-intervenors did not. In *Lykins v. Westinghouse Elec. Corp.*, 27 E.R.C. 1590, 1599 (E.D. Ky. 1988), the court held that the an intervenor did not have to provide separate notice under the CWA. Similarly, in *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344, 1352-53 (E.D.N.C. 1992), the court held that notice from two of five environmental organizations was sufficient under the CWA. Accordingly, the court concludes that plaintiffs provided adequate notice.

3. Jurisdiction

The defendant-intervenors also argue that the Tribe did not properly allege jurisdiction because it failed to allege that the United States could have brought this suit as a trustee. This assertion is meritless. Under 28 U.S.C. § 1362, the Tribe can bring all civil claims arising under the Constitution, federal laws, or treaties into district court.

SUMMARY JUDGMENT STANDARDS AND ARGUMENTS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. *T.W. Elec. Serv., Inc. v. Pacific Electrical Contractors Asso.*, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *T.W. Electrical*, 809 F.2d at 630.

ANALYSIS

The question presented is whether § 401 of the Clean-Water Act, 33 U.S.C. § 1341(a)(1) applies to impacts resulting from cattle grazing under permit by the USFS. Section 401(a)(1) requires that before a federal permit may be issued for "any activity . . . which may result in any discharge into navigable waters," a state certificate must be obtained. 33 U.S.C. § 1341(a)(1). The primary issue is whether the reference to "any discharge into navigable waters" under § 401 is limited to point sources.

"Point source" is defined under the CWA as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

33 U.S.C. § 1362 (14). The term "discharge," when used without qualification in the CWA, includes a discharge of a pollutant, and a discharge of pollutants. *Id.* at § 1362 (16). "Discharge" of a pollutant or pollutants means "any

addition of any pollutant to navigable waters from a point source." *Id.* at § 1362 (12).

The USFS asserts that the plain meaning of "discharge" is limited to a point source or a nonpoint source with a conveyance. Defendant-intervenors claim that "discharge" is limited to point sources only, interpreting the phrase "without qualification" in the discharge definition as allowing some types of nonpoint source activity to fall within the statutory definition of point source.

These arguments contradict the plain meaning of the term "discharge." The term "including" in the discharge deinition permits additional, unstated meanings. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982) (holding that the term "includes" in the CWA allows for additional, unstated meanings); *Exxon Corp. v. Lujan*, 730 F. Supp. 1535, 1545 (D. Wyo. 1990) (holding that the word "includes" instead of "means" indicates that what follows is a non-exclusive list that can be enlarged) *Chemehuevi Indian Tribe v. California St. Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985), ("includes" is a term of enlargement, not of limitation) *rev'd on different grounds* 474 U.S. 9 (1985).

Accordingly, this court concludes that the plain meaning of "discharge" does not restrict the definition to point sources or nonpoint sources with conveyances.

Defendants next argue that their interpretation of § 401(a) should receive deference from this court. Defendants assert that the court should defer to the Forest Service's long-standing practice of not requiring state certification for cattle grazing.

The Supreme Court addressed the standards for determining the amount of deference an agency should receive for its interpretation of a statute in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). If the "intent of the Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. When the statute is silent or ambiguous, the court must determine whether the agency's interpretation is grounded in a permissible construction of the statute. *Id.* at 843.

In interpreting § 401, the Forest Service is not entitled to any agency deference because the EPA, not the Forest Service, administers the CWA. *Baptist Hosp. East. v. Sullivan*, 823 F. Supp. 424, 427 (W.D. Ky. 1993) (holding that a precondition to *Chevron* deference is congressional delegation of administrative authority). An agency that interprets a statute other than the one it is entrusted to administer is entitled to no deference. *Hughes Aircraft Co. v. U. S.*, 29 Fed. Cl. 197, 223 (1993); *Wachtel v. Office of Thrift Supervision*, 982 F.2d 581, 585 (D.C. Cir. 1993) (holding that deference to an agency interpretation is not appropriate where a statute is administered by more than one agency).

Additionally, a *post hoc* rationalization by an agency-counsel, when the agency itself has not taken a position prior to litigation, is not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). The Forest Service's failure to require § 401 certification for cattle grazing is not entitled to deference by this court.

Legislative history is used to ascertain Congress's meaning behind statutory language; where legislative history conflicts, the court must defer to the plain meaning. *United States v. Locke*, 471 U.S. 84, 95 (1985). Defendants contend that the 1970 and 1972 amendments support their argument that the "discharge" definition has a limited meaning. Defendants assert that the 1972 amendments illustrate Congress's redirected emphasis from water quality standards to effluent standards. S. Rep. No. 414, 92nd Cong., 1st Sess. 7-8 69 (1971). This is shown by the lack of references to nonpoint sources in the amendments. *Id.* The amendments focus on Congress's changing emphasis from water quality standards to effluent limitations to control the discharge of pollutants from point sources. *Id.*

Section 401(a) originated as 21(b) under the Water Quality Improvement Act of 1970. The language under this section is identical to the current Act. The 1970 legislative history reveals that Congress intended to regulate all polluting activities through water quality standards. There was no distinction between point and nonpoint sources in the original Act. Senator Cooper stated that the 1970 amendments "require, without exception, that all Federal activities that have any effect on water quality be conducted so that water quality standards be maintained." 115 CONG. REC. 28970 (1969) The 1970 amendments illustrate the broadness of § 401; the 1972 amendments support this.

Even though nonpoint sources are not mentioned in the 1972 amendments, the court cannot construe that Congress intended to preclude their application to § 401. In *Northwest Environmental Advocates v. City of Portland*, 56

F.3d 979, 986 (9th Cir. 1995), the court looked at the 1972 amendments to the CWA and held that "nowhere does Congress evidence an intent to preclude the enforcement of water quality standards that have not been translated into effluent discharge limitations."

Congress's 1972 amendments to the CWA were intended to improve enforcement of pollution from point sources, not supplant the old system. *Id.* The legislative history to the CWA supports the conclusion that § 401 applies to all federally permitted activities that might result in water pollution.

The proposed narrower reading of § 401 is rejected by this court, based on the plain meaning of the word "discharge" as used in § 401, the statutory definition of "discharge," and the legislative history of the CWA. This court holds that § 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources.

The parties do not dispute that cattle grazing may cause water pollution. Plaintiffs' Statement of Material Facts Not in Dispute at ¶ 7. Plaintiffs are not required to prove that cattle grazing on the Camp Creek allotment "will" result in water pollution, only that cattle grazing "may" cause water pollution. *See Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3rd Cir. 1990) (in Clean Water Act enforcement action, plaintiffs need only show that offending discharge "may" cause the alleged adverse effects). Plaintiffs offered undisputed evidence that cattle grazing on the Camp Creek allotment, as authorized by permit # 01607, not only "may" result in pollution, but has resulted in

pollution of both Camp Creek and the Middle Fork of the John Day River. This court finds that pollution caused by cattle grazing constitutes a "discharge . . . into navigable waters" within the meaning of § 401 of the CWA. Therefore, state certification under § 401 was required before the USFS issued a cattle grazing permit on the Camp Creek allotment.

CONCLUSION

For the reasons provided above, plaintiffs' motion (doc. # 99) and plaintiff-intervenor's motion (doc. # 94) for summary judgment are granted. Plaintiffs' request for declaratory judgment that state certification under § 401 of the CWA is required before a cattle grazing permit may be issued is granted. Plaintiffs' request for an injunction prohibiting the USFS from issuing federal cattle grazing permits before the applicant for the permit obtains state certification under § 401 is also granted. All other motions are denied as moot.

IT IS SO ORDERED.

Dated this 26 day of September, 1996.

/s/ Ancer L. Haggert
Ancer L. Haggerty
United States District Judge

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OREGON NATURAL DESERT ASSOCIATION; REST THE WEST; PORTLAND AUDUBON SOCIETY; TROUT UNLIMITED; OREGON WILDLIFE FEDERATION; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NATURAL RESOURCES COUNCIL; PACIFIC RIVERS COUNCIL; OREGON NATURAL RESOURCES COALITION,

Plaintiffs-Appellees,

and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Plaintiff-Intervenor -Appellee,

v.

MICHAEL P. DOMBECK, in his official capacity as CHIEF OF THE UNITED STATES FOREST SERVICE,

Defendant-Third Party Defendant Appellant.

No. 97-35065

DC No. CV-94-00522-ALH

(Filed Apr. 22, 1999)

OREGON NATURAL DESERT ASSOCIATION; REST THE WEST; PORTLAND AUDUBON SOCIETY; TROUT UNLIMITED; OREGON WILDLIFE FEDERATION; NORTHWEST ENVIRONMENTAL DEFENSE CENTER; OREGON NATURAL RESOURCES COUNCIL; PACIFIC RIVERS COUNCIL; OREGON NATURAL RESOURCES COALITION,

Plaintiffs-Appellees,

and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Plaintiff-Intervenor-Appellee,

v.

JACK WARD THOMAS, in his official capacity as Chief of the United States Forest Service,

Defendant,

and

EASTERN OREGON PUBLIC LAND COALITION; ROBERT BURRIL, GRANT COUNTY, a Political subdivision of the State of Oregon,

Defendant-Intervenors/ Third Party Plaintiffs-Appellants.

No. 97-35112/ 97-35115

DC No. CV-94-00522-ALH (District of Oregon)

ORDER

Before: SCHROEDER, FARRIS, and TASHIMA, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

§ 1362. Definitions

[FWPCA § 502]

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

§ 1341. Certification

[FWPCA § 401]

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the

applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the state shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

* * *

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

Supreme Court, U.S.
FILED
AUG 20 1999
OFFICE OF THE CLERK

No. 99-153

In The

Supreme Court of the United States

OREGON NATURAL DESERT ASSOCIATION, OREGON NATURAL RESOURCES COUNCIL, OREGON WILDLIFE FEDERATION, PACIFIC RIVERS COUNCIL, PORTLAND AUDUBON SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, NATIONAL TROUT UNLIMITED, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Petitioners,

v.

MICHAEL P. DOMBECK, in his official capacity as Chief of the United States Forest Service, GRANT COUNTY, ROBERT BURRIL, and EASTERN OREGON PUBLIC LANDS COALITION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT GRANT COUNTY'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does Section 401(a) of the Clean Water Act ("CWA") apply to permits and other licenses issued by federal agencies for activities which may result in nonpoint source pollution.

CORPORATE DISCLOSURE STATEMENT

Grant County, a municipal corporation and political subdivision of the State of Oregon, has no parent company or subsidiaries. -

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 172 F.3d 1092 (9th Cir. 1999). The opinion of the district court (Pet. App. 20-35) is reported at 940 F. Supp. 1354 (D. Or. 1996).

JURISDICTION

The judgment of the court of appeals was filed on May 3, 1999. A petition for rehearing and petition for rehearing en banc was denied on April 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 401(a)(1) of the CWA states:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title . . . No license or permit shall be granted until the certification required by this section has been

obtained or has been waived as provided in the preceding sentence.

33 U.S.C. § 1341(a) (Pet. App. 39)

Section 313(a) of the CWA states:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a).

Section 319(a)(1) of the CWA states:

The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which . . . (B) identifies those categories and subcategories of nonpoint sources or, where appropriate particular nonpoint sources which add significant pollution to each portion of the navigable waters . . . in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation for identifying best management practices and measures to control each category and subcategory

> of nonpoint sources and, where appropriate particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or sources . . .

33 U.S.C. § 1329(a)(1).

Section 319(b) of the CWA states:

> The Governor of each State . . . shall . . . prepare and submit to the Administrator for approval a management program which such State proposes to implement . . . for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

33 U.S.C. § 1329(b)(1).

STATEMENT OF THE CASE

Petitioner challenged the decision of the United States Forest Service to issue Robert and Diana Burril a federal permit to graze 50 head of cattle on the Camp Creek grazing allotment within the Malheur National Forest (Pet. App. 4). Since the cattle wade in the streams and have the potential to introduce waste and sediment into the streams, the Petitioner contended that this activity could only be permitted by the federal government if the state first certified that the permitted activity would comply with the State of Oregon's water pollution control programs.

In issuing the grazing permit the Forest Service did not require certification under § 401 – a practice consistent with its interpretation that the term "discharge" was limited to point sources and therefore certification was not required for federal grazing permits which did not constitute point sources. (Pet. App. 31).[1] While certification was not required, consistent with the federal facilities and property provisions of § 313 (33 U.S.C. § 1323) and the State of Oregon's nonpoint source management program adopted under § 319 of the CWA (33 U.S.C. 1329) (ER 12-32), the Forest Service addressed grazing-caused runoff and other forms of nonpoint source pollution by incorporating into the grazing permit specific measures to control any pollution that may occur (ER 1-9).[2]

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[1] Since its inception in the Water Quality Improvement Act of 1970, the certification provisions have not been applied to grazing permits on federal lands. Pet. App. 31. For over 25 years neither the Forest Service nor the State of Oregon interpreted § 401 as applying to those activities that generate pollution solely from nonpoint sources (ER 10 & ER 11).

[2] Although petitioners refer ominously to the pervasive nature of nonpoint sources of pollution, they fail to disclose that under § 319 (33 U.S.C. 1329) and § 208 (33 U.S.C. 1288) the CWA has left to the states the manner in which to address these pollution sources. The State of Oregon has adopted a nonpoint source pollution management program pursuant to § 319(b)(1) and all federal agencies are required by § 313 to implement the plan (ER 54-67). The State of Oregon's nonpoint source management program was approved by the Environmental Protection Agency pursuant to § 313(d) notwithstanding that the program did not incorporate a certification for activities that might produce pollution from nonpoint sources (ER 33-34).

The district court enjoined the Forest Service holding that any activity which might result in water pollution must be preceded by a state certification under § 401. (Pet. App. 34). The court of appeals reversed, holding that certification under CWA § 401 is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources. (Pet. App. 16).

ARGUMENT

Contrary to the petitioners' contentions (Pet. 5-6), the Ninth Circuit's decision is correct and does not conflict with other decisions in this Court or other circuits. Further review is therefore unwarranted.

I. THE CONTEXT AND HISTORY OF THE CLEAN WATER ACT DEMONSTRATES THAT PERMITS FOR ACTIVITIES THAT PRODUCE POLLUTION SOLELY FROM NONPOINT SOURCES ARE NOT COVERED BY THE CERTIFICATION PROVISIONS OF § 401.

As the Ninth Circuit correctly observed, the context of the CWA does not support the conclusion that § 401 applies to nonpoint sources of pollution. (Pet. App. 9). By selectively focusing on one section of the Water Quality Improvement Act of 1970 (Pub. L. No. 91-224, 84 Stat. 91 (1970)), the petitioners ignore both the history and context of the CWA.

To support their argument the petitioners contend that the certification provisions adopted in the Water Quality Improvement Act of 1970 were intended to cover

both point sources and nonpoint sources of pollution,[3] a contention that is simply wrong for it ignores that the context of the Water Quality Improvement Act of 1970 focused on technology driven controls on industrial and municipal discharges and did not regulate nonpoint sources. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). It was not until the 1987 amendments that a program to regulate nonpoint sources was adopted. *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1316-18 (9th Cir. 1990) (The CWA banned only discharges from point sources and runoff from nonpoint sources was not directly prohibited); *Oregon Natural Res. Council v. U.S. Forest Service*, 834 F.2d 842, 849 fn. 12 (9th Cir. 1987) (nonpoint sources are not regulated by the CWA but are to be addressed through grants and assistance to states who develop management programs).

The context of the certification program at the time it was adopted in the 1970 amendments, demonstrates that Congress did not view the certification requirements as covering all polluting activities. Congress intended certification to apply when the various federal agencies

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[3] The term "point source" means "any discernable confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Nonpoint source pollution is not specifically defined in the CWA but represents the pollution that does not result from the discharge of pollutants through a point source and generally consists of runoff and siltation. *Oregon Natural Res. Council v. U.S. Forest Service*, 834 F.2d at 849 fn. 9; *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984).

issued permits for thermal discharges and dredge spoils.[4] Subsequently, with the adoption of the 1972 amendments, certification was also applicable to Environmental Protection Agency ("EPA") issued National Pollutant Discharge Elimination System permits[5] ("NPDES").[6] *E.P.A. v. Cal. State Water Resources Control Bd.*, 426 U.S. 200, 219, 96 S.Ct. 2022, 2031, 48 L.Ed.2d 578, 591 (1976). *Arkansas v. Oklahoma*, 503 U.S. 89, 112 S.Ct. 1046, 1054-55, 117 L.Ed.2d 239 (1992).

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[4] The Congressional debates demonstrate that the certification provisions were enacted in response to concern over two types of discharge: discharge of heated water from power plants and dumping of spoil material from dredging operations. *See* 115 Cong. Rec. 28,958 (1969); 115 Cong. Rec. 9050 (1969); 116 Cong. Rec. 9332 (1970). Consistent with this legislative intent, the State of Oregon interpreted its certification program to apply to Federal Energy Regulatory Commission hydropower licenses and to § 404 dredge and fill permits (ER 11).

[5] Under § 402 (33 U.S.C. § 1342), either the state or EPA may issue NPDES permits allowing the discharge of a pollutant notwithstanding the prohibitions against discharge of pollutants set forth in § 301 of the CWA (33 U.S.C. § 1311).

[6] Petitioners contend that since point sources are regulated by the states through the NPDES program then it would be superfluous for the certification program to be limited to point sources which the State of Oregon is already regulating under the NPDES permitting program (Pet. 11). Petitioners have overlooked that not all states have – or had at the time of the 1972 amendments – a NPDES permitting program. In those situations where the state does not issue NPDES permits then it is the EPA that issues the permits. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 1789, 68 L.Ed.2d 114 (1981); *Arkansas v. Oklahoma*, 503 U.S. 89, 112 S.Ct. 1046, 1055, 117 L.Ed.2d 239 (1992). Any EPA issued permit is subject to state certification under § 401.

The petitioners' narrow focus on the 1970 Water Quality Improvement Act is misguided in that it ignores that the 1972 amendments represented a major overhaul of the water quality program. Congress viewed the previous legislation to be "inadequate in every vital aspect" and intended to "do something quite different with the 1972 Amendments." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 1793, 68 L.Ed.2d 114 (1981). The 1972 amendments were a "complete rewrite" and "total restructuring" of the federal water pollution law. *Arkansas v. Oklahoma*, 503 U.S. 89, 112 S.Ct. 1046, 1054, 117 L.Ed.2d 239 (1992); *City of Milwaukee v. Illinois and Michigan*, at 1793. The Ninth Circuit correctly noted that the 1972 amendments were to "assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." (Pet. App. 12).

Petitioners simply ignore that it was not until the 1987 amendments (Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 1987) that nonpoint sources were subject to regulation under the CWA. Prior to that date only point sources were regulated. It was within this historical context that the certification provision was adopted.

That certification only applied to point sources is also evidenced by the Congress' interpretation of the term "permits." As used in the CWA the term "permit" applies only to those activities that involve the discharge of pollutants and does not cover those activities associated with nonpoint sources. The Conference Report accompanying the 1972 amendments provided that:

> It is the conferee's intent that a permit means any permit or equivalent document or requirement issued to regulate the *discharge of pollutants.*

Joint Explanatory Statement of the Committee of Conference, Conf. Rep. No. 92-1236 92 Cong. 2d Sess. (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News, 3776, 3822 (emphasis added). The phrase "discharge of pollutants" referenced in the conference committee report is defined as:

> " . . . any addition of any pollutant to navigable waters from any *point source.*"

33 U.S.C. 1362(12) (emphasis added). Congress' statement that permits only applied to documents regulating point sources is consistent with the context of the CWA to focus on discharges from point sources.

Contrary to the petitioners' allegations, nonpoint sources of pollution are not, and have not been, subject to the certification provisions of § 401. The Ninth Circuit's opinion recognized the bright line distinction that Congress intended in the regulation and management between point sources and nonpoint sources of pollution.[7]

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[7] The petitioners simply ignore that nonpoint sources of pollution occurring as a result of permitted activities on federal lands are regulated through other sections of the CWA. Pursuant to § 313 (33 U.S.C. § 1323) wherein all federal agencies are to insure compliance with the applicable water quality programs of the states including the State of Oregon's nonpoint source management plans (ER 12-32) adopted pursuant to § 319. (33 U.S.C § 1329(m)). In fulfilling this mandate the Forest

II. THE TERM DISCHARGE IS LIMITED TO POINT SOURCES.

Petitioners contend that the term "discharge" is an expansive term which was designed to cover all sources of water pollution (Pet. 12).[8] The Ninth Circuit determined that Congress intended that the term be applied only to those discharges that arise from point sources and it did not include pollution arising from nonpoint sources (Pet. App. 12-13).

The legislative history reveals that the term "discharge" was incorporated in the 1972 rewrite to indicate the scope of the control requirements under the CWA – a scope that was limited to the addition of pollutants from a point source. S. Rep. No. 92-414, 92 Cong. 2d Sess. (1971) *reprinted in* 1972 U.S. Code Cong. Ad. News, 3668, 3743. The Ninth Circuit properly recognized that term "discharges" did not include nonpoint sources of pollution. (Pet. App. 12-13). The legal theory upon which the Ninth Circuit based its decision has been extant since

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Service entered into a number of agreements with the State of Oregon wherein it agreed to specific management measures it would undertake to address nonpoint sources of pollution. (*See* ER 35-92). These management measures were incorporated into the grazing permit issued to Mr. and Mrs. Burril (ER 1-9).

[8] The pervasive reach of this expansive interpretation was illustrated by the Ninth Circuit panel's question posed during oral argument wherein petitioners admitted that certification of nonpoint sources of pollution would extend to such innocuous activities as youth camps and children swimming in lakes and streams when these activities occurred on the national forests. This broad interpretation would do little to improve water quality yet would add significant burdens to the permittee, as well as the state and federal agencies.

1987 when the Ninth Circuit issued its decision in *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1982) that nonpoint sources of pollution are not discharges. (*Id.* at 849).

That Congress did not consider nonpoint pollution to be "discharges" covered by § 401 is evidenced by the provisions of § 313 (33 U.S.C. § 1323), wherein Congress clearly distinguished between the terms "discharge" and "runoff" from nonpoint sources of pollution.[9] In § 313, Congress directed that federal agencies were to comply with state laws with respect to water pollution control and abatement. In doing so it expressly noted that any activity which may result in *either a discharge or runoff of pollutants* was covered:

> Each department, agency, or instrumentality of the . . . Federal Government (1) having jurisdiction over any property or facility, or (2) which

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[9] Sections 313 and 401 were companion provisions originally adopted as § 21(a) and § 21(b) respectively of the 1970 Water Quality Control Act. At their inception both provisions applied solely to "discharges"; however, in the 1972 amendments Congress modified § 313 by adding the term "runoff."

This revision illustrates that Congress did not consider runoff from nonpoint sources to be included within the term "discharges." If Congress had intended nonpoint sources to be subsumed within the original term "discharge" as argued by petitioners, then there would have been no reason to modify § 313 to add the new provision dealing with "runoff." Likewise, if Congress had intended runoff from nonpoint sources to be included within § 401, it would have added the term "runoff" at the same time it added the term to the companion provisions of § 313 in the 1972 amendments.

> engaged in any activity resulting, or which may result, in the *discharge or runoff of pollutants* . . .

33 U.S.C. § 1323(a) (emphasis added). The inclusion of the term "runoff" in § 313, stands in stark contrast to the companion provisions of § 401 wherein the term "runoff" was omitted.

This omission demonstrated that Congress did not view the term "discharge" as used in § 401 to include runoff from nonpoint sources. The absence of the term "runoff" or other references to nonpoint sources of pollution speaks forcefully as to Congress' intent that "runoff" was not a "discharge" and that certification was not to apply to nonpoint sources of pollution.

To support its contention that discharges includes nonpoint sources, petitioners argue that since § 401 certification has been required of dams, which have at times been considered to be nonpoint sources of pollution, then all nonpoint sources are subject to certification. (ER 10-11). Petitioners' generalization simply ignores that dams can be both nonpoint sources as well as point sources of pollution. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 fn. 22 (D.C. Cir. 1982) (a dam can in some circumstances be a point source and that the EPA has required § 402 permits for the discharge of grease, oil, or trash through the outlet works of a dam). Contrary to petitioners' contention that dams are solely nonpoint sources, the issue of whether a dam is a point source or a

nonpoint source is one that is dependent upon the facts of each case.[10]

Petitioners' contention that the term "discharge" includes runoff from nonpoint sources is clearly in error. The Ninth Circuit properly concluded that Congress intended the term to refer solely to point sources. (Pet. App. 12).

III. THE PANEL'S OPINION DOES NOT CONFLICT WITH THE REASONING AND CONCLUSION IN *PUD NO. 1 OF JEFFERSON COUNTY V. WASHINGTON DEPARTMENT OF ECOLOGY*

The petitioners' contention that the Ninth Circuit's opinion is contrary to the holding of this Court in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) is without merit. In *PUD No. 1* this Court addressed whether the State could incorporate into a § 401 certification limitations on both point sources as well as nonpoint sources of pollution. The Court held that such conditions are permissible *once* the threshold condition, the existence of a discharge, is satisfied.

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[10] The petitioners' reliance on the *Power Authority v. Williams*, 475 NYS 2d 901 (N.Y. App. Div. 1984), is also misplaced. In *Power Authority*, the court did not apply an expansive definition to the term "discharge", rather it simply held that certifications are required for a discharge even if the discharge was not shown to contain a "specific and identifiable pollutant" (*id.* p. 904), a conclusion that is consistent with the Ninth Circuit's holding in this case.

Contrary to petitioners' contention, *PUD No. 1*, did not address whether a discharge was present, nor did it need to since all parties conceded that the construction of the dam would result in discharges from point sources through the release of water through the dam's tailrace and through dredge and fill material entering the waterway.

> There is no dispute that petitioners were required to obtain a certification from the State pursuant to 401. Petitioners concede that, at a minimum the project will result in two possible discharges – the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.

PUD No. 1 of Jefferson County, 114 S.Ct. at 1908.

In *PUD No. 1* the parties never argued nor did the Court address the issue of whether a nonpoint source standing alone must obtain a certification under § 401 before a federal permit may issue. The Ninth Circuit's interpretation of the term discharge is consistent with *PUD NO. 1*. Further, its interpretation is consistent with holdings in other circuits as well. *State of North Carolina v. FERC*, 112 F.3d 1175, 1188-89 (D.C. Cir. 1977); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988).

As the Ninth Circuit properly concluded, the holding in *PUD No. 1* is not in conflict with the determination that the term "discharge" does not include "runoff" from

nonpoint sources of pollution. There is no conflict with prior decisions of this Court.

IV. CONCLUSION

The panel's opinion in this case does not conflict with this Court's holding in *PUD No. 1*. Further, the opinion does not conflict with the specific language or legislative intent of the CWA. The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 20th day of August, 1999.

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Supreme Court, U.S.
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No. 99-153

In The

Supreme Court of the United States

OREGON NATURAL DESERT ASSOCIATION, OREGON NATURAL RESOURCES COUNCIL, OREGON WILDLIFE FEDERATION, PACIFIC RIVERS COUNCIL, PORTLAND AUDUBON SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, NATIONAL TROUT UNLIMITED, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Petitioners,

v.

MICHAEL P. DOMBECK, in his official capacity as Chief of the United States Forest Service, GRANT COUNTY, ROBERT BURRIL, and EASTERN OREGON PUBLIC LANDS COALITION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Was the Ninth Circuit correct in ruling that grazing permits in national forests are not subject to the certification requirements of § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, because the term "discharge" as used in that section does not include releases from nonpoint sources?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

There is no parent or publicly held company owning 10% or more of the stock of Respondent-Intervenor Eastern Oregon Public Land Coalition ("EOPLC").

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STATEMENT OF THE CASE

Question Presented – And Why It Does Not Merit This Court's Review

Section 401 of the CWA prohibits the federal government from issuing a permit for "any activity . . . which may result in any *discharge* into navigable waters" unless the applicant for the permit first provides certification from the state that the discharge from the permitted activity "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."[1] All of the cited sections regulate point sources of pollution – that is, "discernible, confined and discrete conveyance[s]" such as a pipe, ditch, or machine[2] – and only one references water quality standards affecting nonpoint sources of pollution (such as cattle grazing).[3]

The petition in this matter seeks this Court's review of the Ninth Circuit's ruling that the CWA, when examined as a whole, cannot support the conclusion that the term "discharge" in § 401 includes releases from nonpoint

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[1] 33 U.S.C. § 1341(a) (1986 & West Supp. 1999) (emphasis added).

[2] *Id.* at § 1362(14).

[3] In their statement of the case, Petitioners assert that § 401 requires certification that the discharge at issue "will not violate state water quality standards,"which are the primary means of regulating nonpoint source pollution. (Pet. 2-3) In fact, all of the referenced sections regulate *point sources* and only one, § 1313, references water quality standards, which are used to regulate both point sources and nonpoint sources. Apart from § 1313, none of the referenced sections relate to nonpoint sources, and sections that regulate nonpoint sources otherwise are not referenced in § 401.

sources. As detailed below, there is no cause for this Court to review that ruling because (a) it reflects the settled practice for over 25 years of the federal and state agencies charged with administering § 401, (b) it soundly resolves the question at issue in a manner consistent with the legislative history and structure of the CWA, and (c) it presents no conflict with this Court's opinion in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology* ("*PUD No. 1*").[4]

Mechanisms For Regulating Nonpoint Source Pollution That The Petition Overlooks

The petition gives short shrift to other methods by which the CWA regulates nonpoint source pollution, asserting instead that without the use of the certification procedure contained in § 401, the states are deprived of their most important means of protecting themselves from pollution originating on federal lands. (Pet. 6-7) On the contrary, numerous other methods of addressing nonpoint source pollution exist, many of which were employed in the permit at issue. For example, § 208 of the CWA[5] directs states to draft water treatment plans that include procedures for identifying nonpoint source pollution from various sources, including agriculture, and to establish best management practices ("BMPs")[6] to control

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[4] 511 U.S. 700 (1994).

[5] 33 U.S.C. § 1288 (1986 & West Supp. 1999).

[6] The Environmental Protection Agency ("EPA") defines BMPs as "the methods, measures or practices to prevent or reduce water pollution including, but not limited to structural and nonstructural controls, operation and maintenance

such pollution. Section 319[7] requires states to prepare reports that identify navigable waters that cannot be expected to achieve or maintain water quality standards because of nonpoint source pollution, nonpoint sources responsible for impairing the identified waters, and the existing programs for controlling and abating pollution added from nonpoint sources. Section 319 also requires states to devise management programs to control pollution added from nonpoint sources and improve the quality of such waters and to identify and implement BMPs. Finally, Section 313[8] mandates that federal agencies comply with all state water pollution requirements.

Nonpoint Source Pollution Controls Employed In The Grazing Permit At Issue

These means of regulating nonpoint source pollution were employed in the permit at issue. In July of 1993, the United States Forest Service ("USFS") issued a ten-year grazing permit to Respondent-Intervenor Robert Burril and Diana Burril to graze fifty head of cattle in the Camp Creek allotment of Oregon's Malheur National Forest. (USFS Excerpt of Record ("USFS ER") at 38) The permit lists a particular season of use (June through October), but actual grazing time permitted in a particular allotment or pasture is governed by forage utilization standards in an annual operating plan ("AOP") monitored by USFS personnel. (*Id.* at 38, 116) Accordingly, the permit

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procedures, [and] other requirements." EPA Water Quality Standards Handbook (August 19, 1987).

[7] 33 U.S.C. § 1329 (West Supp. 1999).

[8] 33 U.S.C. § 1323 (1986).

specifies that it can be cancelled or modified at any time "to conform with needed changes brought about by law, regulation, Executive order, allotment management plans, land management planning, numbers permitted or seasons of use necessary because of resource conditions, or the lands described otherwise being unavailable for grazing." (*Id.* at 38)

The forage utilization standards contained in the AOP come from the Land Resource Management Plan ("LRMP") for the Malheur National Forest and are designed to allow the recovery of riparian and upland areas. (Grant Co. Excerpt of Record ("Grant Co. ER") at 106, 108; USFS ER at 117) BMPs are incorporated in turn into the LRMP. (USFS ER at 100; Grant Co. ER at 111) Accordingly, the permit required consistency with the LRMP:

> Prior to completion and implementation of the scheduled individual [allotment management plans], we will be working with you through the [AOP] to bring management of the Camp Creek Allotment into consistency with the terms of the [Malheur Forest LRMP]. (Grant Co. ER at 4)

In compliance with § 313, the LRMP contained specific provisions designed to comply with the state's water quality requirements described in Memoranda of Understanding between the Oregon Department of Environmental Quality and the USFS. (*Id.* at 111) Additionally, the LRMP specifically incorporated the provision that grazing activities were to comply with state requirements for protecting the waters of the state through planning, application, and monitoring of BMPs. (*Id.*) Livestock grazing was to be managed so that water quality would

meet Oregon state standards. (*Id.* at 113) All of these requirements are incorporated by reference into the permit at issue. (*Id.* at 4)

Despite employment of all of these measures, Petitioners filed this action alleging that the USFS had violated § 401 by issuing a grazing permit without first obtaining the State of Oregon's certification that the grazing would not violate the state's water quality standards.[9] Respondents Robert Burril, Grant County, and EOPLC intervened as defendants. The district court granted the summary judgment motions of Petitioners, and the Ninth Circuit reversed, holding that the certification requirement of § 401 was meant to apply only to point source releases.[10]

REASONS FOR DENYING THE WRIT

Notwithstanding Petitioners' rhetoric about the serious threat of nonpoint source pollution, the decision below does not merit this Court's review. That decision does not leave the states without recourse for regulating nonpoint source pollution, as Petitioners suggest. (Pet. 6-7) Rather, it affirms more than a quarter century of practice by the states and the affected federal agencies – undisturbed by Congress and the courts – in carrying out their duties to regulate nonpoint source pollution not by means of the certification procedure of § 401 but under other sections of the CWA. Moreover, the decision below

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[9] 172 F.3d 1092, 1094 (9th Cir. 1998) (Pet. App. 4).

[10] *Id.* at 1093-94 (Pet. App. 3-4).

soundly resolves the issue presented in a manner consistent with the legislative history and structure of the CWA. Finally, that decision presents no conflict with this Court's opinion in *PUD No. 1*.

A. The decision below does not merit this Court's review.

The dire picture presented by Petitioners entirely omits reference to the alternative measures employed by the affected federal and state agencies for regulating nonpoint source pollution. The Ninth Circuit's decision is consistent with the longstanding practice of those agencies, and overturning it would upset settled expectations under circumstances where Congress has not seen fit, and the courts have not even had occasion, to disturb those expectations. The decision below also adequately addresses all of Petitioners' concerns and soundly resolves the issue presented. Accordingly, that decision does not merit this Court's review.

1. The Ninth Circuit's decision reflects the long-settled practice of the affected federal and state agencies.

For more than 25 years, the state and federal agencies charged with enforcing the CWA have applied § 401 in the manner approved by the Ninth Circuit below – that is, they have not subjected nonpoint source activity to the certification procedure under § 401 but instead have

employed the means for regulating nonpoint source pollution embodied in other sections of the CWA.[11] During all that time, Congress has not interfered with the prevailing application of § 401 to point source activity, even in the course of adopting amendments in 1987 specifically designed to improve regulation of nonpoint sources. The 1987 amendments, which included the addition of § 319,[12] are described in the legislative history as "an important *first step* in establishing a national nonpoint source program."[13] Section 319 was established "to require development of implementation programs to control nonpoint source pollution."[14] As one senator serving on the Committee on Environment and Public Works, commented:

> For the first time we are authorizing a new nonpoint source pollution control program which is meant to reduce water degradation caused by different types of agricultural runoff and soil erosion. . . . We purposely avoided

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[11] Although Petitioners are correct that dams have been treated as subject to § 401 certification (Pet. 10-11), it is not clear that dams are regulated as nonpoint sources rather than as point sources of nonpollutants. *See, e.g., PUD No. 1*, 511 U.S. at 711; *National Wildlife Fed'n v. Gorsuch* ("*NWF*"), 693 F.2d 156, 165 (D.C. Cir. 1982); *see also* discussion below at page 11. In any event, Petitioners do not contend, nor could they, that state and federal agencies have treated all nonpoint source activity as subject to § 401 certification.

[12] *See* above at pages 3.

[13] S. Rep. No. 99-50, at 8 (1985) (emphasis added).

[14] *Id.* at 33; *see also* H. Rep. No. 99-189, at 8 (1985).

implementing a mandatory regulatory program for nonpoint pollution.[15]

Despite this heightened attention to nonpoint source pollution in enacting the 1987 amendments, Congress did not indicate any need for revising agency practice to assure that the certification procedure under § 401 was employed to control nonpoint sources – indeed, it appears that Congress assumed such certification was *not* happening. In any event, Congress has not seen fit to disturb existing agency application of § 401, either in 1987 or in any other year since the enactment of § 401 in 1972.

Likewise, the application of § 401 to nonpoint sources has received virtually no attention in the federal courts since its enactment. The decision below is the only circuit court decision to address the issue, and apart from the underlying district court opinion, only one other district court has addressed the question, issuing an unpublished ruling consistent with the Ninth Circuit's opinion in this matter.[16]

Reversal of the Ninth Circuit's decision would upset long-settled expectations – with no indication that such sweeping change is necessary or even advisable. Indeed, Petitioners appear to be proposing a solution in search of

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[15] 133 Cong. Rec. S1003 (daily ed. January 21, 1987) (statement of Sen. Simpson).

[16] *Idaho Conservation League v. Caswell*, No. CV 95-394-S-MHW, slip op. at 16-18 (D. Idaho August 12, 1996) (EOPLC Excerpt of Record at 207, 222-24) (holding that nonpoint source activity connected with construction of logging road is not subject to certification requirement under § 401).

a problem, given the nearly total lack of attention by Congress and the courts to the application of § 401 to nonpoint sources. Accordingly, the petition below does not merit this Court's review.

2. The Ninth Circuit's decision soundly resolves the issue presented.

The decision below likewise does not merit this Court's review because it interprets § 401 in a manner that is consistent with its legislative history and structure. Each of Petitioners' criticisms of that sound decision are easily resolved by reference to the decision itself.

First, contrary to Petitioners' contention (Pet. 8-9), it does not necessarily follow from the use of the word "includes" in the statutory definition of "discharge" that Congress intended "discharge" within the meaning of § 401 "to include, but not be limited to, point source activities." Section 401 applies to activities that "may result in any discharge."[17] According to Section 502(16), "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."[18] In turn, "[d]ischarge of a pollutant" and "discharge of pollutants" are defined as "any addition of any pollutant to navigable waters from any point source."[19] The plain language of these definitions clearly allows for the Ninth Circuit's interpretation that "discharge," as used without qualification in § 401, includes

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[17] 33 U.S.C. § 1341(a)(1).

[18] 33 U.S.C. § 1362(16).

[19] 33 U.S.C. § 1362(12)(A).

discharges of pollutants *and discharges of nonpollutants.* Indeed, even one of the authorities Petitioners cite as support for their claim that it necessarily follows that "discharge" includes more than point source activities, *Power Authority v. Williams,* applied the same interpretation the Ninth Circuit did.[20]

Second, Congress's concern with nonpoint source pollution is overstated by Petitioners (Pet. 9) and in any event does not inevitably lead to the conclusion that nonpoint sources are included in the definition of "discharge" in § 401. Petitioners' contention (*id.*) that § 401 was "originally intended to address" nonpoint sources of pollution finds no support in the history of that section. Apparently Petitioners intend this argument to be a reference to their interpretation of § ~~21~~(b) of the Water Quality Improvement Act (*id.* at 4),[21] the precursor to § 401 that was enacted in 1970. However, as even Petitioners' admit (*id.*), neither the 1970 Act nor § 21(b) made any distinction between point and nonpoint sources of pollution. It hardly follows that § 401 was enacted with the intention of addressing nonpoint sources of pollution. In any event, whatever the level of Congress's concern with nonpoint source pollution, it does not necessarily follow that that concern, already addressed in other sections of the CWA,[22] was also addressed in § 401.

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[20] 101 A.2d 659, 660, 475 N.Y.S.2d 901, 904 (N.Y. App. Div.), *appeal denied,* 63 N.Y.2d 605 (N.Y. 1984) (cited at Pet. 8-9) (interpreting "discharge" in § 401 as applying to nonpolluting discharges, which may cause pollution).

[21] Pub L. No. 91-224, § 21(b), 84 Stat. 91 (1970).

[22] *See* above at pages 2-3.

Third, contrary to Petitioners' contention (Pet. 10-11), the D.C. Circuit in *NWF* did exactly what the Ninth Circuit's opinion in this matter says it did:[23] like the Ninth Circuit, the D.C. Circuit treated some discharges that may cause pollution as discharges of *nonpollutants*, thereby endorsing the concept that a point source like a dam could "discharge" within the meaning of the CWA both pollutants and nonpollutants.[24] As the D.C. Circuit held,[25] discharges of nonpollutants are not regulated through the § 402 permit program, which applies only to discharges of pollutants[26] – but as the Ninth Circuit reasoned in this matter, discharges of nonpollutants *are* regulated under the broader coverage of § 401. In any event, contrary to Petitioners' contention (Pet. 10), *NWF*, while helpful, is not the sole or even the principal basis for the Ninth Circuit's decision.

Fourth, contrary to Petitioners' contention (Pet. 11), the language of § 401 in fact *could* have been written more broadly. As the Ninth Circuit explained,[27] had Congress intended to require certification for nonpoint source activities, it easily could have written § 401 to mirror the language of § 313, which directs federal agencies "engaged in *any activity* resulting, or which may result, in the discharge *or runoff* of pollutants" to comply with applicable water quality standards.[28]

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[23] 172 F.3d at 1098 (Pet. App. 15).

[24] 693 F.2d at 165.

[25] *Id.*

[26] *See* 33 U.S.C. § 1342 (1986 & West Supp. 1999).

[27] 172 F.3d at 1098 (Pet. App. 14).

[28] 33 U.S.C. § 1323(a) (emphasis added).

Fifth, Petitioners' analysis of the legislative history of § 401 (Pet. 13-15) does not call the Ninth Circuit's analysis into question. As the panel explained,[29] the relevant difference between § 21(b), which made no distinction between point sources and nonpoint sources, and its revision in 1972 to become § 401 is the shift in emphasis to regulation of point sources. Although Petitioners attempt to gloss over this distinction (Pet. 15-16), the change from requiring certification that a discharge "will not violate applicable water quality standards"[30] to requiring certification that a discharge will not violate a list of enumerated sections, *all* of which apply to point sources and only *one* of which applies to water quality standards affecting nonpoint sources – without mention of other sections that apply to nonpoint sources – reflects a deliberate shift in the intended use of the certification procedure, as the Ninth Circuit recognized.[31] That shift is addressed explicitly in the Senate Report for § 401:

> [Section 401] is substantially section 21(b) of existing law . . . amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.[32]

Contrary to Petitioners' contention (Pet. 17), the language of § 401 was not "broadened" to include the newly

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[29] 172 F.3d at 1096 (Pet. App. 9-10).

[30] Pub. L. No. 91-224, § 21(b)(4), 84 Stat. 91, 108 (1970).

[31] 172 F.3d at 1097 (Pet. App. 12-13).

[32] S. Rep. No. 92-414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3764 (emphasis added).

adopted National Pollutant Discharge Elimination System program. Rather, the broad, undifferentiated reference to "water quality standards" in § 21(b) was narrowed to refer only to sections that address point sources. Moreover, contrary to Petitioners' assertion (Pet. 17-18), the Ninth Circuit's analysis is consistent with this Court's statement in *Arkansas v. Oklahoma*[33] that compliance with water quality standards is required under § 401; the Ninth Circuit likewise recognized that for activities to which § 401 applies, certification of compliance with water quality standards is still required.[34]

Sixth, the inclusion of 33 U.S.C. § 1313 among the enumerated sections in § 401 does not nullify the latter section's focus on point sources, as Petitioners claim (Pet. 18-20). As the Ninth Circuit explained,[35] all of the enumerated provisions in § 401 apply to point sources; none save one apply to nonpoint sources, and several provisions relating to nonpoint source pollution are not included in § 401. Following Petitioners' logic, Congress would have had to dispense with requiring certification of point source compliance with water quality standards so as not to sweep all nonpoint sources into the certification procedure, simply because water quality standards apply to both.[36] Yet, as Petitioners insist (Pet. 20) and the

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[33] 503 U.S. 91, 103 (1992).

[34] *See* 172 F.3d at 1097 (Pet. App. 12) (noting that reference in § 401 to water quality standards required in 33 U.S.C. § 1313 provides supplementary basis for regulating point sources).

[35] *Id.* at 1097 (Pet. App. 12-13).

[36] That is precisely the analogy to *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842 (9th Cir. 1987),

Ninth Circuit acknowledged,[37] water quality standards remain separately enforceable after the 1972 amendments. Petitioners' conclusion that as a result, Congress intended to apply § 401 to nonpoint sources (Pet. 20) simply does not follow, nor does the Ninth Circuit's opinion imply that water quality standards were established "solely" to regulate point source pollution, as Petitioners' contend (Pet. 19). In other words, the fact that water quality standards still apply does not answer whether *certification* of compliance with those standards is required under § 401. As the Ninth Circuit correctly concluded, certification of compliance is required only for point sources, and compliance for nonpoint sources is dealt with in other sections of the CWA.[38]

Finally, contrary to Petitioners' contentions (Pet. 21-22), there is no reason to conclude that § 401 is the

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reflected in the Ninth Circuit's opinion. 172 F.3d at 1097 (Pet. App. 13). There plaintiffs argued that because one section referenced in § 301, 33 U.S.C. § 1311, relates to water quality standards, § 301 in its entirety applies to nonpoint sources. Likewise here, Petitioners have argued that because one section referenced in § 401 relates to water quality standards, § 401 in its entirety applies to nonpoint sources.

[37] 172 F.3d at 1097 (Pet. App. 12).

[38] Contrary to Petitioners' assertion (Pet. 21), the Ninth Circuit did not reason that "because" nonpoint source pollution is not directly regulated by the federal government through the CWA, it is not included in § 401. Rather, the Ninth Circuit explained that although nonpoint source pollution is not regulated directly, the CWA uses the "threat and promise" of federal grants to the states to accomplish this task. *Id.* at 1096-97 (Pet. App. 10-11).

states' "primary mechanism" for regulating federally permitted activities or that the Ninth Circuit's interpretation of § 401 strips the states of authority to address nonpoint source pollution generated by federally permitted activities. Indeed, § 313,[39] requires federal agencies to comply with all state water pollution requirements – and it is absurd to suggest that the states have failed to use their primary mechanism for regulating federally permitted activities for more than a quarter century. Rather, the settled practice of the affected state and federal agencies has been to regulate such activities under other sections of the CWA that authorize them to do so.

B. The decision below does not conflict with this Court's decision in *PUD No. 1*.

Petitioners' contention that the Ninth Circuit's decision conflicts with this Court's decision in *PUD No. 1* (Pet. 22-23) appears to be tossed in almost as an afterthought – and in any event, that contention lacks merit. The issue for resolution in *PUD No. 1* was whether § 401 authorizes states to condition certification on compliance with water quality standards in the context of discharges from point sources. As the Ninth Circuit recognized,[40] this Court held that § 401 did so authorize the states "once the threshold condition, the condition of a discharge, is satisfied."[41] This Court began its analysis of the CWA by observing that the focus of the CWA is upon

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[39] 33 U.S.C. § 1323.

[40] 172 F.3d at 1097-98 (Pet. App. 13).

[41] 511 U.S. at 712, *quoted in* 172 F.3d at 1097-98.

"individual *discharges* into the country's navigable waters *from point sources,*" without elaborating on the definition of a "discharge" under § 401.[42] Petitioners' argument boils down to a suggestion (Pet. 22-23) that the fact that this Court did *not* hold in *PUD No. 1* that a "discharge" triggering § 401 certification must emanate from a point source means that the Ninth Circuit's holding to that effect somehow *conflicts* with this Court's opinion. That suggestion, of course, lacks any basis in fact or logic – particularly given that the parties in *PUD No. 1* conceded that the construction of the dam at issue would involve two types of *point source* discharges.[43] No conflict exists between *PUD No. 1* and the decision below.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted this 23rd day of August, 1999.

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[42] 511 U.S. at 711 (emphasis added).

[43] *Id., cited in* 172 F.3d at 1098.

Supreme Court, U.S.
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No. 99-153

In the Supreme Court of the United States

OREGON NATURAL DESERT ASSOCIATION, ET AL.,
PETITIONERS

v.

MICHAEL P. DOMBECK, CHIEF, UNITED STATES
FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the issuance of permits for the grazing of cattle in National Forests requires prior state certification under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a).

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In the Supreme Court of the United States

No. 99-153

OREGON NATURAL DESERT ASSOCIATION, ET AL., PETITIONERS

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MICHAEL P. DOMBECK, CHIEF, UNITED STATES FOREST SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 172 F.3d 1092. The opinion of the district court (Pet. App. 20-35) is reported at 940 F.Supp. 1534.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17-19) was entered on July 22, 1998. A petition for rehearing was denied on April 22, 1999 (Pet. App. 36-38). The petition for a writ of certiorari was filed on July 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a permit issued by the Forest Service, an agency of the Department of Agriculture, for the grazing of 50 head of cattle on a grazing allotment in the Malheur National Forest in eastern Oregon. Petitioners alleged that the issuance of the permit violated Section 401(a)(1) of the Clean Water Act (CWA), 33 U.S.C. 1341(a)(1). That Section provides that no federal agency may issue a permit or license for any activity involving "any discharge into the navigable waters," unless the agency obtains certification from the State in which the discharge originates that the discharge will comply with specified Sections of the CWA. See 33 U.S.C. 1341(a)(1). The Forest Service did not require Section 401(a)(1) certification for the permit in question here—and has never required such certification for grazing permits in general—on the ground that grazing activities do not involve "discharges" within the meaning of Section 401(a)(1). The district court held that Section 401(a)(1) applies to all activities that may contribute to water pollution and enjoined the Forest Service from issuing grazing permits without Section 401(a)(1) certifications. The court of appeals reversed.

1. a. The CWA recognizes and addresses two distinct types of water pollution. First, the Act addresses the "discharge of pollutants," defined as the release of pollutants from a "point source." See 33 U.S.C. 1362(12). The term "point source" means "any discernible, confined, and discrete conveyance," such as a "pipe, ditch, [or] * * * conduit." 33 U.S.C. 1362(14). The Act establishes a "national goal" to eliminate the "discharge of pollutants" into navigable waters. See 33 U.S.C. 1251(a)(1).

The principal mechanism for controlling point-source pollution is the "National Pollutant Discharge Elimination System" or "NPDES," which establishes a national permit program for all pollutant discharges into navigable waters. See 33 U.S.C. 1342; see also *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101-103 (1992); *EPA* v. *State Water Resources Control Bd.*, 426 U.S. 200, 204-209 (1976) (describing NPDES requirements). Under the NPDES program, "[e]very point source discharge is prohibited unless covered by a permit." *Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1980) (emphasis omitted). The States have primary responsibility for implementing the NPDES program. See 33 U.S.C. 1251(b). Any State may seek authorization to administer the NPDES permit program for point sources within the State. See 33 U.S.C. 1342(b). EPA has granted most States (including Oregon) such authority. See 58 Fed. Reg. 12,035, 12,036 (1993). However, authorized programs are subject to federal standards, oversight, and enforcement. See generally 33 U.S.C. 1342(b), (c) and (k) (federal approval of state programs), 1319 (federal enforcement).

Second, the CWA addresses pollution from sources other than point sources. The Act announces a "national policy" to develop programs for the control of "nonpoint sources" of water pollution. See 33 U.S.C. 1251(a)(7). Although not defined in the Act, the term "nonpoint source" refers to a source of water pollution —such as runoff from agricultural activities—that is not a "point source," *i.e.*, that is not "any discernible, confined and discrete conveyance," 33 U.S.C. 1362(14), and is therefore not subject to "point source" controls. See *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988); *Oregon Natural Resources Council* v. *United States Forest Serv.*, 834

F.2d 842, 849 (9th Cir. 1987); *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); see also 7 C.F.R. 634.5(e) (defining "agricultural nonpoint source pollution"); 40 C.F.R. 35.1605-4 (defining "nonpoint source" pollution in relation to grant program for restoration of freshwater lakes). Section 319 of the Act, 33 U.S.C. 1329, directs States to develop programs to control nonpoint source pollution, but leaves the enforcement under such programs to the States. See also 33 U.S.C. 1288(b)(2)(F) ("agriculturally and silviculturally related nonpoint sources of pollution" are included in programs for areawide waste-treatment management plans).

b. Consistent with the goal of integrating federal and state programs for controlling water pollution, Section 401(a)(1) of the Clean Water Act requires federal agencies to ensure that "any discharges" from federally licensed or permitted activities will comply with state-administered discharge controls. In particular, Section 401(a)(1) provides in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with [specified CWA provisions].

33 U.S.C. 1341(a)(1). The provisions cited in Section 401(a)(1) relate to various Clean Water Act programs for controlling point source pollution.

Section 401(a) was enacted in 1972, as part of the amendments that created the NPDES program. See

Pub. L. No. 92-500, § 2, 86 Stat. 877. Section 401(a)(1) was modeled on an earlier provision—Section 21(b)—which was enacted as part of the Water Quality Improvement Act of 1970. See Pub. L. No. 91-224, § 103, 84 Stat. 108. Before the 1972 amendments, the Act addressed water pollution primarily through water-quality standards—*i.e.*, standards designating the acceptable levels of pollutants for specific bodies of water. *EPA* v. *State Water Resources Control Bd.*, 426 U.S. at 202. Section 21(b) was oriented toward those standards. It provided in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that there is reasonable assurance, as determined by the State * * * that such activity will be conducted in a manner which will not violate applicable water quality standards.

See 84 Stat. 108. The 1972 amendments amounted to a "'total restructuring' and 'complete rewriting'" of the Act. *Milwaukee* v. *Illinois*, 451 U.S. at 305 (quoting legislative history). Because programs based on water quality standards proved inadequate for addressing the conduct of individual polluters, Congress changed the statutory focus from the enforcement of water quality standards to the control of discrete pollutant discharges. See *EPA* v. *State Water Resources Control Bd.*, 426 U.S. at 202-203. As part of the restructuring, Congress revised (and enacted as Section 401(a) of the CWA) the prior Section 21(b), so as to direct the focus

of the certification requirement to the Act's new discharge programs. See S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971).

c. Section 401(a)(1) refers to "discharges" from permitted or licensed activities; it does not refer to pollutant "runoff" or pollution from "nonpoint sources." That does not mean, however, that federal agencies may ignore state programs to control nonpoint source pollution. Section 313 of the Clean Water Act, 33 U.S.C. 1323, generally provides that federal agencies must comply with requirements under such state programs. Section 313(a) provides in pertinent part that:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or *runoff* of pollutants * * * shall be subject to, and comply with, all Federal, State, interstate, and local requirements * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity * * *.

33 U.S.C. 1323(a) (emphasis added).

2. The permit challenged in this case was a ten-year grazing permit issued by the Forest Service in 1993 to Robert and Diana Burrill, allowing them to graze 50 head of cattle on the Camp Creek Allotment in the Malheur National Forest in eastern Oregon. Such grazing could contribute to water pollution in streams flowing through the allotment. Cattle may enter the streams and deposit animal waste. Cattle may also increase sedimentation and stream temperature by

foraging on stream banks and removing shade vegetation. Pet. App. 4.

The Burrills' grazing permit is subject to conditions designed to minimize such nonpoint source pollution. Pursuant to Section 319 of the Clean Water Act, 33 U.S.C. 1329, the Oregon Department of Environmental Quality (ODEQ) developed best management practices (BMPs), including limits on levels of grazing, to mitigate the adverse impacts of cattle grazing on water quality. Under a memorandum of agreement with the ODEQ, the Forest Service included corresponding BMPs in the land and resource management plan for the Malheur National Forest and the Camp Creek Allotment. Gov't C.A. E.R. 55-61. The Burrills' permit is subject to those restrictions. *Id.* at 41.

3. Petitioners commenced this citizen suit under the Clean Water Act, 33 U.S.C. 1365, in the United States District Court for the District of Oregon, seeking a declaratory judgment that the Forest Service could not lawfully issue the Burrils' grazing permit without first obtaining a certification from the State of Oregon under Section 401(a)(1) that the grazing contemplated under the permit would not violate Oregon's water quality standards. The district court granted summary judgent to petitioners, concluding that the Forest Service must obtain a Section 401(a)(1) certification before issuing a permit for activities that could cause nonpoint source pollution. Pet. App. 20-35. The district court based that conclusion on two grounds.

First, the district court noted that Section 401(a)(1) requires a certification for any activity that "may result in any discharge," 33 U.S.C. 1341(a)(1). The terms "discharge of a pollutant" and "discharge of pollutants" are defined in the CWA to refer to point sources. See 33 U.S.C. 1362(12). The CWA further provides that the

term "discharge" "when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. 1362(16). The court reasoned that "[t]he term 'including' in the discharge definition permits additional, unstated meanings," and that "the plain meaning of 'discharge' does not restrict the definition to point sources or nonpoint sources with conveyances." Pet. App. 31.

Second, the district court stated, based on its review of the legislative history for Section 21(b) of the Water Quality Improvement Act of 1970 (84 Stat. 108)—the predecessor of Section 401(a)(1)—that Congress intended that provision to regulate "all polluting activities." Pet. App. 33. Noting that the 1972 amendments that enacted the current Section 401 were intended to broaden, not narrow, the scope of the Act, the district court concluded that Section 401(a)(1) likewise applies to "all federally permitted activities that may result in a discharge, including discharges from nonpoint sources," or, in other words, to "all federally permitted activities that might result in water pollution." *Id.* at 34.

4. The court of appeals reversed. With respect to the meaning of "discharge," the court of appeals found that the term is used consistently throughout the Clean Water Act to refer to the "release of effluent from a point source." Pet. App. 13-14. The court held that the term "discharge" is defined more broadly than the term "discharge of a pollutant" not because "discharge" is intended to apply to nonpoint source pollution, but because "discharge" is intended to include "all releases from point sources," including releases (such as releases through dams) that do not involve the "addition of a pollutant." *Id.* at 15. With respect to legislative history, the court of appeals observed that Section 21(b) of the Water Quality Improvement Act of 1970 was

replaced by Section 401(a)(1) of the Clean Water Act in 1972 "to assure consistency with the [Act's] changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." See *id.* at 12 (citing S. Rep. No. 414, *supra*, at 69). As noted by the court, Section 401(a)(1) now requires States to certify that "any discharge" from a federally-licensed project will comply with various Sections of the Clean Water Act that "relate to the regulation of point sources." Pet. App. 12. In short, the court of appeals found that certification under Section 401(a)(1) of the CWA is required only for federally permitted activities that may result in "discharges from point sources." *Ibid.*

ARGUMENT

The court of appeals correctly held that Section 401(a)(1) of the Clean Water Act does not apply to grazing and other federally-licensed activities that do not involve point source pollution. The court's holding is consistent with a plain reading of the Act and with more than 25 years of consistent agency practice. It does not conflict with any decision of this Court or with any decision of another court of appeals. Further review is therefore not warranted.

1. Section 401(a)(1) expressly applies only to activities that involve or may involve a "discharge." The term "discharge," as used in Section 401(a)(1), does not apply to all sources of water pollution. In drafting the Act, Congress was careful to distinguish between the "discharge" of pollutants from conveyances and the "runoff" from nonpoint sources of pollution. See *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d at 582. The court of appeals correctly held that Section 401(a) certification is required for activities that

may result in "discharges" (*i.e.*, releases from point sources), but that such certification is not required for activities that involve "runoff" (*i.e.*, flows from nonpoint sources).

a. The fact that Congress defined the term "discharge" separately from the phrase "discharge of a pollutant" does not mean that Congress intended the former term to be divorced from the concept of a "point source." Indeed, the obvious distinction between a "discharge" and a "discharge of a pollutant" is not the presence or absence of a point source, but the presence or absence of a pollutant. The existence of a point source determines whether there is a "discharge" at all. The term "discharge of a pollutant" then more specifically refers to the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). As the court of appeals recognized (Pet. App. 15), the term "discharge" standing alone "includes" the addition of pollutants from point sources, 33 U.S.C. 1362(16), and it also includes other "point source" releases that do not involve the "addition of pollutants."

For example, water flows released through a dam pass through a "point source" or "discrete conveyance" and thus are "discharges" within the meaning of the Clean Water Act. See *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d at 165. Because such discharges typically do not involve the "addition" of pollutants, the discharges usually are not subject to NPDES permitting requirements. *Id.* at 174-175 (deferring to EPA interpretation). However, such "discharges" are subject to Section 401 certification. See, *e.g.*, *PUD No. 1* v. *Washington Dep't of Ecology*, 511 U.S. 700, 711 (1994).

Had Congress intended Section 401(a) to apply to nonpoint source pollution in addition to pollution caused by "discharges," Congress could have said so. When

drafting the Act's requirement that federal facilities comply with the substantive requirements of state law —in a provision enacted at the same time as Section 401(a)—Congress made that requirement applicable to any federal activity "resulting, or which may result, in the *discharge or runoff* of pollutants." See 86 Stat. 875, 33 U.S.C. 1323(a) (emphasis added). Congress could have used similar language in Section 401(a) in identifying which federal activities also require a prior state certification. In the alternative, Congress could have expressly defined the term "discharge" to include pollutant "runoff" or "nonpoint source" pollution. Instead, Congress expressly limited Section 401(a) to "discharges," and defined the term "discharge" (in relation to the phrase "discharge of pollutants") to mean a "point source" release.[1]

b. Petitioners' reliance (Pet. 12-17) on legislative history related to Section 21(b) of the Water Quality Improvement Act of 1970 is misplaced. Section 21(b), like Section 401(a), expressly referred to federally licensed activities that may result in "any discharge." When Section 21(b) was enacted, the term "discharge" was not defined. Petitioners cite a report by a Committee of the House of Representatives stating that Section 21(b) was intended to apply to any licensed activity "that could in fact become a source of pollution." See Pet. 14 (citing H.R. Rep. No. 127, 91st Cong., 1st Sess. 7, 20 (1969)). That report language could

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[1] Standard dictionary definitions support the conclusion that the term "discharge" refers to a release of water through a conveyance. See *Webster's Third New Int'l Dictionary* 644 (1986) (defining "discharge" as, *inter alia*, "to send forth" and "to give outlet to: pour forth: emit"; see also *PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) (quoting dictionary definitions of discharge as "a flowing or issuing out" and "something that is emitted").

perhaps be read to suggest that the term "discharge" in Section 21(b) was not intended to be a term of limitation, despite the narrower focus of that term in ordinary usage (see note 1, *supra*). None of the legislative reports cited by petitioners, however, expressly addressed "runoff" or "nonpoint" pollution. Further, petitioners cite no case law or other authority actually applying Section 21(b) to activities—such as grazing on federal lands—that implicate only nonpoint source pollution.

In any event, whatever may have been the meaning of Section 21(b), Congress completely rewrote the Clean Water Act two years after Section 21(b) was enacted. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 489 (1986); *Milwaukee* v. *Illinois*, 451 U.S. at 317-318. In the course of the statutory overhaul, Section 21(b) was repealed and replaced with Section 401(a). At the same time, Congress added definitions for the terms "discharge," "discharge of a pollutant," and "point source." Given the complete rewriting of the statute, including the addition of applicable definitions, the legislative reports relating to the superseded statutory provision no longer provide authority for the meaning of the term "discharge" in the new Section 401(a).

According to legislative reports accompanying the 1972 amendments, Section 401 was revised (as compared with Section 21(b)) "to assure consistency" with the new legislative emphasis on "the elimination of any discharge of pollutants." See S. Rep. No. 414, *supra*, at 69. Congress achieved that goal in part by tying the certification requirement to the new requirements applicable to the types of discharges that may result in discharges of pollutants, *i.e.*, releases from point sources. There is no basis for the assumption that

Congress intended in addition to sweep into the certification program a wide variety of federal permits for activities that may result in runoffs (*i.e.*, flows from nonpoint sources). Accordingly, whatever may have been the scope of the supplanted Section 21(b), the court of appeals correctly held that the term "discharge," as used in Section 401(a), means the same as the term "discharge" as used and defined in the phrase "discharge of pollutants"—*i.e.*, a "point source" release.

c. Petitioners argue (Pet. 18-20) that Section 401(a)'s reference to state water quality standards indicates that Section 401(a) applies to permits for activities that may result in runoffs or nonpoint source pollution. The fact that Section 401(a) refers to state water quality standards, however, is irrelevant to the issue of whether Section 401(a) applies to nonpoint sources.

Section 21(b) called upon States to determine whether federally-licensed activities would "violate applicable water quality standards." By referring to Section 303 of the Clean Water Act—which directs States to develop water quality standards—Section 401(a) retains a reference to such standards. In particular, Section 401(a) calls upon States to determine whether "discharges" from licensed activities would "comply with" Section 303. 33 U.S.C. 1313. Contrary to petitioners' argument (Pet. 20), however, that reference does not "confirm" a supposed congressional intent to extend the applicability of Section 401(a) to nonpoint pollution sources. Water quality standards provide a basis (in addition to technological standards) for establishing effluent limitations on particular point sources. See *EPA* v. *State Water Control Bd.*, 426 U.S. at 205 n.12; *Oregon Natural Resources Council* v. *United States Forest Serv.*, 834 F.2d at 849-850. Although water quality standards could also provide a basis for

establishing controls on activities that cause nonpoint source pollution, the mere reference to water quality standards does not convert a program for the control of "discharges" into a program for the control of all water pollution, including that caused by runoffs. *Id.* at 850.

Petitioners also err in arguing (Pet. 21) that States are without "authority to address nonpoint pollution generated by federally permitted activities" if the prospect of nonpoint source pollution does not trigger review under Section 401(a). State authority to regulate nonpoint source pollution is recognized under Sections 101(b) and 319 of the Clean Water Act, 33 U.S.C. 1251(b), 1329. Section 313(a) of the Clean Water Act expressly provides that "runoff of pollutants" from any federal property, facility, or activity is subject to all state water pollution laws. See 33 U.S.C. 1323(a). The court of appeals did not free federal agencies or federal permittees from that duty to comply with nonpoint source pollution requirements imposed by the States. The court of appeals simply held that federally-licensed activities that do not involve discrete discharges are not subject to Section 401's requirement of a prior certification by the State.

2. Petitioners err in contending (Pet. 22) that the decision of the court of appeals is contrary to this Court's decision in *PUD No. 1* v. *Washington Department of Ecology, supra.* *PUD No. 1* involved the State of Washington's review of plans for a federally-licensed hydroelectric project. The project was designed to divert water from a river and run the water through turbines to generate electricity, then return the water to the river more than a mile downstream. 511 U.S. at 708-709.

Because the water would be returned through a "tailrace," it was undisputed in *PUD No. 1* that the pro-

ject involved a "discharge" and was subject to Section 401 certification. 511 U.S. at 711. The only dispute was whether the State could impose limitations on the project's water intake as a condition of certification under Section 401(d), 33 U.S.C. 1341(d). 511 U.S. at 710. Such limitations were aimed at maintaining minimum stream flows in the "bypass reach"—*i.e.*, the stretch of the river between the project's intake point and the project's discharge point. *Ibid.* This Court held that the "threshold condition" for Section 401 certification was a "discharge," but once that condition was met, the State could impose "conditions and limitations on the activity as a whole." *Id.* at 712.

Contrary to petitioners' assertion (Pet. 23), *PUD No. 1* did not address nonpoint source pollution. The focus of *PUD No. 1* was on conditions related to the *removal* of water from a river, not conditions related to the addition of pollutants from nonpoint sources. The Court clearly acknowledged that the "threshold condition" for Section 401 certification is "the existence of a discharge." 511 U.S. at 711. In the present case, the court of appeals reached the very same conclusion, holding that Section 401 certification is not required for grazing permits because cattle grazing does not involve "discharges" within the meaning of Section 401.

3. Finally, petitioners' contention that Section 401(a) certification is required before the federal government may issue a permit for any activity that may result in a runoff (*i.e.*, a flow from a nonpoint source) is contrary to consistent administrative practice for more than a quarter of a century since the CWA was enacted. Under petitioners' theory, virtually every federal permit for grazing, camping, harvesting timber, or undertaking any other activity on federal land that is anywhere near navigable water would require a Section

401(a) certification, since every such activity could result in a runoff into the water. Yet no federal agency has ever required Section 401(a) certification before issuing a permit for an activity merely because that activity could result in a runoff, and, prior to this case, no State had attempted to enforce the certification authority that petitioners contend exists.[2] The court of appeals' decision adopting this consistent administrative understanding of Section 401(a) is correct and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] After the district court's decision in this case, the Oregon Department of Environmental Quality promulgated regulations regarding Section 401(a)(1) certification for Forest Service grazing permits. Or. Admin. R. 340-048-0100 *et seq.* (1998). The State has informed the Forest Service that, after the court of appeals' decision in this case, it ceased accepting any applications for Section 401(a)(1) certification of federal grazing permits.